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Martha Coakley
District Attorney

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THE LAW OF THRESHOLD INQUIRY

I. INTRODUCTION

In general, the Fourth Amendment to the United States Constitution and Article Fourteen of the Declaration of Rights to the Massachusetts Constitution protect against unreasonable searches and seizures (both with or without a warrant) conducted by law enforcement agents. One of the several categories of warrantless searches and seizures falling within the scope of these provisions is the "threshold inquiry," more commonly known as a "stop and frisk" search. The legal test as to whether a given encounter is a stop and if so, whether it is lawful, is one of reasonableness, with the burden of proof on the government.

First, not every encounter between police and citizens constitutes a "stop." "Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrest, or injuries, or loss of life." Terry v. Ohio, 392 U.S. 1, 13 (1968). A stop or seizure may be defined as any citizen detention of a limited nature initiated by a police officer in which, under the totality of the circumstances, a reasonable person would not have felt free to terminate the encounter and leave. Commonwealth v. Thin Van Cao, 419 Mass. 383, 386 (1995). Under Terry v. Ohio, and its Massachusetts statutory counterpart G.L. c. 41, §98, a police officer may briefly

detain and question a person on less than probable cause to arrest if the officer has a "reasonable suspicion" -- based upon specific and articulable facts -- that the person has committed, is committing, or is about to commit a crime. The lawfulness of the detention, the manner in which it is effectuated, and the length and scope of the resulting inquiry will vary with the circumstances of each case.

A frisk may be defined as a search for weapons if a police officer has reasonably concluded on the basis of specific and articulable facts that the suspect is armed and dangerous. Terry v. Ohio, supra; G.L. c. 41, § 98. While the permissible scope of the frisk will depend upon the circumstances of each case, it will usually be limited to a pat-down of the suspect's outer clothing. Where a police officer reasonably fears for his safety or the safety of the public, other locations -- such as a car's interior or items carried by the suspect -- may be searched for weapons.

Each threshold inquiry should be viewed as potentially having two parts: the stop or seizure; and the frisk. In other words, whether it is proper during a Terry "stop" to make a protective "frisk" of the suspect is a question separate and apart from the issue of whether it was permissible to stop the suspect in the first place. Regardless of whether the frisk occurs simultaneous with or subsequent to the stop, the stop first must be proved lawful before any resulting frisk will be upheld. (As discussed in Section V(E), there are rare instances in which a lawful frisk is not preceded by a stop.)

II. IDENTIFYING WHEN A SEIZURE HAS OCCURRED

A. Encounters Versus Seizures

"[N]ot every encounter between an officer and a citizen constitutes a stop or seizure." Commonwealth v. Pimentel, 27 Mass. App. Ct. 557, 560 (1989). It is the circumstances surrounding each encounter which will determine whether the defendant was stopped within the meaning of threshold inquiry law. Id. at 560. An objective standard is used: "a person has been 'seized' . . . if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Commonwealth v. Borges, 395 Mass. 788, 791 (1985), quoting from United States v. Mendenhall, 446 U.S. 544, 554 (1980). Where there has been no seizure, an individual is not afforded any constitutional protection. When, however, an encounter does rise to the level of a stop in the Terry sense, both the requisite level of suspicion and the limited scope of the inquiry apply.

Merely because a police officer addresses a question to a citizen on the street does not mean that a Terry "stop" has necessarily occurred. In many situations an officer may approach and address questions to a citizen without causing a reasonable belief that her freedom is being restricted. See e.g., Commonwealth v. Thinh Van Cao, 419 Mass. 383, 388 (1995) (no seizure occurred when police officer approached defendant in parking lot, asked him to identify himself and have his photograph taken because a reasonable person would have believed he was free to leave and refuse to be photographed). In order for the encounter

to rise to the level of a seizure, there must be some show of authority on the part of law enforcement. For example, in Commonwealth v. Sanchez, 403 Mass. 640, 644 (1988), a police officer approached the defendant, identified himself as an officer and showed his badge. Informing the defendant that he was conducting a narcotics investigation, he asked the defendant if would speak with him and consent to a search, telling him that he could refuse. The court held that there was no seizure because there was no show of authority. Sanchez, 403 Mass. at 644. See also Commonwealth v. Pimentel, 27 Mass. App. Ct. 557, 560 (1989) (three officers who stopped their cruiser parallel to a parked truck as the defendant-passenger exited did not "stop" or "seize" the defendant by approaching him because they did not block the path of the truck or the defendant's ability to walk away).

Not a Seizure

Courts have held that police interaction with a citizen did not amount to a "seizure" where: an officer asked a person for identification in a manner not suggesting he was compelled to comply, Mendenhall, 446 U.S. at 555; an officer investigating a report of a man with a handgun told a young man standing in a group on a city sidewalk to take his hands out of his pockets, Commonwealth v. Fraser, 410 Mass. 541 (1991); an officer engaged the defendant in casual conversation, Commonwealth v. Mulero, 38 Mass. App. Ct. 963, 964 (1995); Commonwealth v. Thomas, 38 Mass. App. Ct. 928 (1995); a trooper told a suspect he could refuse to talk, asked for identification, and the suspect consented to a

pat-frisk, Commonwealth v. Moore, 32 Mass. App. Ct. 924 (1992); police in a marked cruiser followed alongside a suspect running down the street, Michigan v. Chesternut, 486 U.S. 567 (1988); police followed a car for a short distance, Commonwealth v. Groves, 25 Mass. App. Ct. 933, 935 (1987); police cruiser backed up in direction of defendant and officer identified himself, Commonwealth v. Wallace, 45 Mass. App. Ct. 930, 931 (1998); police followed a car based on a hunch that the occupants were dealing drugs, Commonwealth v. Nutile, 31 Mass. App. Ct. 614, 618 (1992); a trooper positioned his cruiser a short distance behind the defendant's moving car, Commonwealth v. Jiminez, 22 Mass. App. Ct. 286, 289-290 (1986); officers followed a suspect into a public restroom, Commonwealth v. Laureano, 411 Mass. 708, 710 (1992); a trooper walked over to parked car in commuter parking lot at 9:45 p.m., shined flashlight inside, and did not prevent the defendant from leaving, Commonwealth v. Doulette, 414 Mass. 653, 655 (1993); plainclothes police in an unmarked car drove up to the defendant in a non-abrupt manner. Commonwealth v. Wedderburn, 36 Mass. App. Ct. 558, 560 (1994); police officer approached three men and requested they approach and speak with him without any direction to stop was not a seizure because there was no record of intimidation or assertive conduct by police, Commonwealth v. Gunther G., 45 Mass. App. Ct. 116, 117 (1998).

Care-taking Function is not a Seizure

There are also those circumstances where an officer approaches an individual in the performance of his

care-taking duties. Case law makes clear that such encounters do not rise to the level of a seizure.

In Commonwealth v. Leonard, 422 Mass. 504 (1996), a trooper in a marked cruiser pulled along-side a car parked in the breakdown area of a heavily-traveled parkway at about one o'clock in the morning. After the driver, a middle-aged woman, failed to respond to the cruiser's lights, siren, or P.A. system, the trooper pulled behind the car, approached the driver's side and knocked on the window several times. Again receiving no response, and concerned for the driver's well-being, the trooper opened the unlocked driver's door, asked the woman "what was wrong," but was then verbally abused. Upon request, the woman was eventually able to locate her license, but continued to curse at the trooper and had a strong odor of alcohol on her breath. She was forcibly removed after physically resisting and refusing to step outside of her car. On appeal, the Court stated that the observations of the woman and her demeanor were admissible at trial, and the defendant's rights under the state or Federal constitutions were not violated, where the trooper's actions were minimally intrusive and not unreasonable under the circumstances. Id. at 508-509.

Similarly, in Commonwealth v. Murdough, 428 Mass. 760, 763 (1999) the court held that officers properly approached a motor vehicle and inquired as to the driver's condition without seizing the driver where the driver was apparently asleep with the engine off at a highway rest area for one and one-half hours on a cold day. When the driver became incoherent and lost consciousness, the officers had an

objective basis for believing that the driver's safety and well-being were in jeopardy and could order him to exit the car. Murdough, 428 Mass. at 763. See also Commonwealth v. McHugh, 41 Mass. App. Ct. 906, 907 (1996) (act of officer pulling alongside car stopped in highway traffic lane for no apparent reason and inquiring of defendant whether assistance was needed did not constitute an investigatory stop or search).

B. An Encounter Becomes a Seizure

There are situations where, based on information learned during an initial encounter, an officer wishes to continue to question an individual about possible criminal activity. Once that occurs, the encounter becomes a seizure and the officer must have reasonable articulable suspicion of criminal activity to detain the suspect. When that occurs depends upon such factors in the officer's conduct as whether there was a show of force used to continue the encounter or whether officers pursued a suspect who attempted to terminate the encounter by fleeing.

A Show of Authority Converts an Encounter into a Seizure

Once a police officer engages in any "show of authority" which might reasonably cause a person to feel that he is not free to ignore the officer or to walk away, a seizure has taken place. A seizure may be deemed to have occurred where, for example, the officer directs the person to stop or remain at a given location, blocks his direction of travel, displays a weapon as he approaches the person, physically touches the person's body, uses words or tone of voice that indicates compliance may be compelled, causes

several officers to surround the person, or keeps possession of an item belonging to the person. Mendenhall, 446 U.S. at 554; Commonwealth v. Stawarz, 32 Mass. App. Ct. 211, 213-214 (1992).

In Commonwealth v. Houle, 35 Mass. App. Ct. 474, 476 (1993), the court held that an encounter occurred when a police officer approached the defendant and asked "Are you Bill?" The encounter was converted to a stop however, when the officer ordered the defendant to spit out what was in his mouth. See also Commonwealth v. Thomas, 38 Mass. App. Ct. 928 (1995) (casual conversation was an encounter but the order to spit out what was in defendant's mouth turned it into a stop).

The Stop Starts when the Pursuit Begins

Under Article 14 of the Massachusetts Declaration of Rights, a person is "seized" when a police officer initiates a pursuit with the obvious intent of requiring the person to submit to questioning. Commonwealth v. Thibeau, 384 Mass. 762, 764 (1981) ("stop starts where pursuit begins"). Contrast California v. Hodari D., 111 S.Ct. 1547 (1991) (under 4th Amendment, a pursuit is not a seizure).

For example, in the Gunther G. case, the officer could approach three men and ask them to come and speak with him without "seizing" them. Once one of the men fled and the officer chased him, the encounter turned into a stop. The stop was justified because the officer had a radio transmission about three men and a dog in the area where a shooting occurred and no one but those men and the dog were there at that late hour. When one of the men pointed,

backed up, said "they're down there," and fled the officer had reasonable articulable suspicion to chase the man. Gunther, 45 Mass. App. Ct. at 118-119.

In contrast, the Court in Commonwealth v. Stoute, 422 Mass. 782, 788-789 (1996), found that a seizure occurred when police began to chase the defendant who refused to stop his bicycle in response to a police request, but instead rode away, jumped off the bicycle, and fled by foot. As the police pursued him, the defendant discarded a white plastic bag, later determined to contain cocaine. The defendant's narcotics convictions were affirmed, nevertheless, where the requisite suspicion justifying the police pursuit was present before the chase. Id. at 791.

III. REASONABLE SUSPICION OF UNLAWFUL CONDUCT

General Laws c. 41, § 98, provides that a police officer may stop and question a person whom the officer has "reason to suspect of unlawful design." To be lawful, a stop must be based on a reasonable suspicion that the person detained has committed, is committing, or is about to commit a crime. Commonwealth v. Stoute, 422 Mass. 782 (1996); Commonwealth v. Thibeau, 384 Mass. 762 (1981); Commonwealth v. Cantalupo, 380 Mass. 173 (1980). Though the officer need not have probable cause to believe that the suspect is involved in criminal conduct, he or she must have more than a mere hunch. Reid v. Georgia, 448 U.S. 438, 441 (1980); Thibeau, supra at 764. The police officer must be able to point to specific and articulable facts, and any rational inferences which may be drawn therefrom, which justified his or her suspicions. Royer, supra; Reid, supra at 458; Commonwealth

v. Williams, 422 Mass. 111 (1996); Thibeau, supra at 763. Each case must be evaluated based on its unique facts.

In Terry v. Ohio, an experienced police officer had observed the defendant and another person repeatedly approach a store, look in through the window, and walk back to confer with a third person standing a short distance away. The United States Supreme Court held that under those circumstances, the officer reasonably believed that the suspects were casing the store for a robbery and was warranted in stopping the suspects. Terry, supra at 22-23.

However, in Commonwealth v. Bacon, 381 Mass. 642 (1980), the Massachusetts Supreme Judicial Court held that a police officer had no more than a mere hunch that criminal activity was afoot when he observed a "youthful" operator of an expensive vehicle obscure his face as the police cruiser passed by. The suspect's act of holding his hand in a manner which concealed his face from the officer, standing alone, did not justify a belief that the operator was anything but an innocent motorist. Similarly, in Commonwealth v. Cheek, 413 Mass 492 (1992), the court held that officers had no more than a mere hunch when they stopped a Black man wearing a dark colored three-quarter length goose-down jacket which fit the recently radioed description of the jacket worn by a suspect in a stabbing. The Court emphasized that the radioed description could have fit many men in the Roxbury neighborhood, and that the officers possessed no additional physical description of the suspect which might have distinguished him from other Black males in the area. Cheek, 413 Mass. at 496-497.

Courts emphasize that reasonable suspicion exists only where a suspect is somehow distinguished from the many innocent persons who might engage in similar conduct. For example, a DEA agent's suspicion that narcotics were being transported was not reasonable when based solely upon observing the arrival of a passenger with no checked baggage on a scheduled night flight from Fort Lauderdale. The United States Supreme Court stated that these facts did not sufficiently set the suspect apart from the many innocent passengers traveling in a similar fashion to justify a brief investigative detention. Reid, 448 U.S. at 458; Commonwealth v. O'Laughlin, 25 Mass. App. Ct. 998, 999 (1988) (behavior of passenger exiting plane from New York did not set him apart from large class of innocent travelers who have no luggage).

Similarly, the police were not warranted in conducting a threshold inquiry where all they observed was a car parked in the parking lot of an establishment that served liquor with its engine running, headlights off, and interior lights illuminated. Commonwealth v. Helme, 399 Mass. 298, 301 (1987). However, an officer had a right to conduct a threshold inquiry upon seeing a person in a hotel parking lot at 3:15 a.m., standing beside a car with its hood up and motor running, when there had been a large number of car thefts from that lot. Commonwealth v. Patti, 31 Mass. App. Ct. 440, 443 (1991). Moreover, when the defendant put his hands in his pockets the officer had a right to frisk him for his protection. The officer's actions, however, "approached the outer limits of the Terry privilege."

A. Factors Which Justify A Stop

The more common categories of facts and circumstances which contribute to a police officer's suspicions of criminal activity are discussed below. It should be kept in mind that only in rare instances will a single factor justify a suspicion of criminal behavior. A key exception, however, is where a subject commits an observed act which is itself grounds for a stop; most commonly, a motor vehicle violation.

1. Police Observations Of Suspicious Conduct

The most common situation in which an investigative stop occurs is when the police officer's observations of suspicious conduct causes him to detain the suspects while he briefly investigates their activities. See Commonwealth v. Williams, 422 Mass. 111 (1996). In Williams, uniformed police on patrol saw the defendant, accompanied by another male, sprint down a busy Boston street in broad daylight, pull his shirt off, discard it, and by-standers point toward him. The officers followed in the cruiser but did not attempt to stop him. One officer got out of the cruiser to investigate as the defendant, who was covered in blood, ran behind a house. The defendant attempted to scale a chain link fence and refused to stop when requested. The officer followed the defendant, drew his revolver, and ordered him to the ground. As another officer arrived, the defendant got up and again attempted to run. The Court found that the police had sufficient reasonable suspicion to effect the threshold inquiry, noting that the seizure occurred once the police left the cruiser and chased the suspects on foot.

Id. at 117. See also, Commonwealth v. Kitchings, 40 Mass. App. Ct. 591 (1996) (officer's routine inquiry of parked van with no registration plate elevated into reasonable suspicion that four men in van were engaged in criminal activity where there was a strong odor of burnt marijuana coming from vehicle); Commonwealth v. Moses, 408 Mass. 136, 140 (1990) (experienced officer who saw three men in car stopped in high crime area interacting with others, and three men fled when they saw police, had reasonable suspicion that drug transaction had taken place); Commonwealth v. Doulette, 414 Mass. 653, 654-655 (1993) (officer who saw car parked in remote area with interior light on and occupant who bent over as if to pick up something, had reasonable suspicion for Terry stop); Commonwealth v. Patti, 31 Mass. App. Ct. at 443 (officer who saw person at 3:15 a.m. in hotel parking lot, where there had been many reported car thefts, standing beside car with hood up and engine running had reasonable suspicion to conduct threshold inquiry).

However, police observations in Commonwealth v. Ellis, 12 Mass. App. Ct. 476, 477 (1981), did not create a reasonable suspicion of criminal behavior. An officer saw a person standing outside a vehicle parked in a public lot appear to hand something to the occupants who in turn passed something back to the person outside. The Court held that the subsequent stop of the vehicle as it left the lot was not justified. The officer could not point to any other factors (e.g., high crime area, flight, known criminals)

which, taken together with the observed conduct, warranted a suspicion of criminal conduct.

Police should consider a variety of factors before concluding that an individual's conduct is suspicious and deserving of further investigation. These include:

-- Time Of Day. Certain actions are suspicious merely because of the time of day at which they are observed. For example, police were justified in stopping a pedestrian observed at 2:50 a.m., carrying a shopping bag through a residential neighborhood where there had been several incidents of breaking and entering, Commonwealth v. Mathews, 355 Mass. 378, 381 (1969), and in stopping a car that was cruising slowly at 2:30 a.m. through a shopping center where numerous break-ins had occurred. Commonwealth v. Montgomery, 23 Mass. App. Ct. 909 (1986).

-- Character Of The Area. Police stops may be justified by the character of the area in which suspicious conduct is observed. For example, further investigation may be warranted when two persons are observed passing money in an area known for drug sales. Commonwealth v. Battle, 1 Mass. App. Ct. 579, 582 (1973).

However, a poor neighborhood where a disproportionate share of crime occurs should not be considered a high crime area for purposes of constitutional analysis. The required emphasis must be an area noted for a particular type of crime, such as a street with frequent drug trafficking or a neighborhood with many car thefts. In Commonwealth v. Cheek, 413 Mass. at 496-497, the Court noted that a report of a crime in a "high crime area" does not permit a broad

police sweep of a neighborhood. The Court stated, "[t]he problems that may face the Grove Hall section of Roxbury or any other similar 'high crime area' will not be resolved any more readily by excluding the individuals who live there from the protections afforded by our Constitution." In Commonwealth v. Phillips, 413 Mass. 50, 58-59 (1992), the Court upheld the suppression of evidence seized pursuant to a "search gangmembers on sight" police policy in Roxbury. In that case, police approached the defendants on the basis of a "hunch" that they were in a stolen car. The Court referred to the police conduct as "egregious." In Commonwealth v. Thinh Van Cao, 419 Mass. 383 (1995), the Supreme Judicial Court reaffirmed Phillips and Cheek, and emphasized that it upheld the field interrogation observation policy targeted at Asian youths only because an encounter, rather than a seizure, was involved. See also Commonwealth v. Houle, 35 Mass. App. Ct. 474, 476 (1993) (no reasonable suspicion where only a couple's presence in an area known for prostitution and drug activity raised a question about the propriety of their activities). In contrast, a "block-in" seizure of the occupants of a motor vehicle was upheld where a car was double-parked with its engine running in a "high crime area," but was parked directly in front of a building that was the subject of an ongoing narcotics investigation, in the vicinity of which several narcotics-related arrests had been made. Commonwealth v. Thompson, 427 Mass. 729, 734 & n.1 (1998).

-- Reaction Of Suspect Upon Seeing The Police. The reactions of a suspect upon seeing the police may contribute

to the officer's suspicions. While it may be an innocent response for a citizen to glance at an approaching officer or to be reluctant to pass a police cruiser, Commonwealth v. Bacon, 381 Mass. 642 (1980), these observations, when combined with other factors, may justify a reasonable suspicion of criminal conduct. The nervous appearance of a person fitting the description of a suspect being sought for questioning, Commonwealth v. Anderson, 366 Mass. 394 (1974), or the attempt of a motorist to flee upon seeing a police cruiser, Commonwealth v. Ling, 370 Mass. 238, 241 (1976), are articulable facts which properly contribute to police suspicions. If the officers from whom the suspect flees are in plainclothes, it lessens the suspiciousness of the suspect's actions. Commonwealth v. Pena, 31 Mass. App. Ct. 201, 206 (1991). An officer's plain view of a passenger in a stopped automobile, placing what appeared to be a plastic bag down the front of his pants, will give the officer a basis for a Terry threshold inquiry of that passenger regarding the object placed in his pants. Commonwealth v. Alvarado, 420 Mass. 542, 547-549 (1995).

In Commonwealth v. Marrero, 33 Mass. App. Ct. 440, 445 (1992), the suspect's abrupt flight provided much of the justification for the stop. There, an officer approached a group of young men standing near an abandoned building, the site of an earlier break. The defendant appeared from around a corner near the doorway of the abandoned building. When the officer asked the defendant to stop for a moment so he could check the building, the defendant shouted "f--- you" and ran. Calling it a close case, the Court stated

that the defendant's response transformed the officer's hunch into "reasonable suspicion." While an attempt to elude police once pursuit has begun may not be considered as a factor in determining reasonable suspicion for a stop, police may take this behavior into account in determining the existence of probable cause to arrest. Thibeau, supra at 764; Commonwealth v. Dise, 31 Mass. App. Ct. 701, 705 n.8 (1992).

-- Individual Does Not Fit The Area. Police suspicions may be aroused when an individual is observed in an area in which he seems to be unfamiliar, improperly dressed, or unknown to an officer familiar with the residents. A threshold inquiry may be proper when a well-dressed man is seen taking money in a very poor area, Battle, supra, or two vehicles are observed parking as if preparing to rob a pharmacy in a small town. Commonwealth v. Corridori, 11 Mass. App. Ct. 469 (1981). IMPORTANT NOTE: Notwithstanding the foregoing, the fact that a person of a particular race is seen in an area not frequented by people of the same race is not a justifiable reason for conducting a Terry stop.

-- Police Knowledge Of Criminal Reputation. While knowledge that a citizen has a criminal history is not by itself a proper basis for conducting a threshold inquiry, it may justify a stop when coupled with other suspicious facts and circumstances. For example, police were justified in stopping an individual known to have a prior conviction for unlawfully possessing a firearm after receiving information that he was carrying a gun in a bar. Commonwealth v. Ballou, 350 Mass. 751, 755 (1966).

2. Location Near Scene Of A Recent Crime

Having knowledge of a very recent crime, a police officer may be justified in stopping an individual when a combination of factors makes it reasonable to believe that the individual was involved in that crime. These factors may include:

-- Particularity Of Description. If the police officer has been furnished with a description of the suspect, a stop may be justified on the basis of the description alone if the person reasonably matches it. For example, in Commonwealth v. Carrington, 20 Mass. App. Ct. 525, 528 (1985), police officers acting on a description given by a rape victim stopped the suspect, who fit the description but was wearing different clothing, a few blocks from the scene of the crime. Contrast Commonwealth v. Cheek, *supra*, where a description of a suspect which described only his jacket was considered inadequate because it did not adequately differentiate the suspect from others.

-- Proximity To Crime Scene. A stop will be justified if made at a time or place at which the suspect could reasonably be expected to be found, given the time and place of the crime under investigation and the location of the suspect. In other words, a threshold inquiry would be appropriate if conducted within minutes of a criminal act and at a place close enough to the scene of the crime as to reasonably suspect that the individual questioned could have been involved in the crime. For example, in Commonwealth v. Reed, 23 Mass. App. Ct. 294, 296 (1986), a motor vehicle stop was ruled proper where the police, after receiving tips

that three Black men in a red van had been stealing hubcaps in a shopping mall parking lot, observed the van and the men described driving away from the mall shortly after the report of the crime.

-- Number Of Persons In Area. If the number of persons in an area is great, a threshold inquiry will have to be based on a particularized description of the suspect or a combination of other facts and circumstances. Cheek, 413 Mass. at 496-497. However, a less precise description of a suspect may suffice if the individuals stopped are the only pedestrians on the street where witnesses indicated the suspects were last seen. Commonwealth v. Gunther G., 45 Mass. App. Ct. 116, 118 (1998).

-- Known/Probable Direction Of Flight. Observing a person traveling in the direction reported to the police by witnesses as being the direction of flight may contribute to the officer's reasonable belief that the individual stopped is connected to the criminal activity being investigated. Commonwealth v. Claiborne, 423 Mass. 275, 281 (1996).

3. Information From Informants

Unlike an arrest based on probable cause, an officer will not have to demonstrate both the basis of the information and the previous reliability of the source if acting on an anonymous tip or information from an unnamed informant to conduct an investigatory stop. However, the officer should be able to demonstrate that the information has indicia of reliability. Commonwealth v. Ciaramitaro, 26 Mass. App. Ct. 110, 114 (1988). When the police rely on an unnamed informant's information, they must corroborate

specific, nonobvious facts when determining the informant's basis of knowledge and reliability. For example, an anonymous informant's information that a white male named "Wayne" would be traveling with another white male in a silver Hyundai, Maine registration 440-44T, from Chelsea to Bridgeport, Maine, was held to be insufficient, even when corroborated, as a basis for a threshold stop. Commonwealth v. Lyons, 409 Mass. 16, 20 (1991). Contrast Commonwealth v. Va Meng Joe, 40 Mass. App. Ct. 499 (1996) (unidentified informant's tip, corroborated by independent police observations, exhibited sufficient indicia of reliability for reasonable suspicion to make investigatory stop of defendant's car).

In Adams v. Williams, 407 U.S. 143, 147 (1971), a police officer on late night patrol received information from a person known to him that the occupant of a nearby vehicle was carrying narcotics and that a gun was holstered at his waist. The United States Supreme Court held that the hour of the night and the reliability of the informant justified a threshold inquiry of the motorist. In Commonwealth v. Anderson, 366 Mass. 394 (1974), the police received an anonymous note from a passenger on a bus that a man in the bus terminal was armed and possessing narcotics. A threshold inquiry was proper due to the particularity of the suspect's description in the note and the suspect's nervous conduct observed after police arrived at the terminal. It also was important that the anonymous tip was in writing as this decreased the possibility that the tip was fabricated.

In Commonwealth v. Ferrioli, 10 Mass. App. Ct. 489, 491 (1980), a woman informed police that her husband had threatened to shoot up their house, that he often carried a gun, that he had previously shot at her, and that he might be under the influence of amphetamines. A stop and frisk of the husband/suspect was proper due to the reliability of his wife, his previous history, and the specificity of the information.

In Commonwealth v. Blake, 23 Mass. App. Ct. 456, 459 (1987), the police were justified in conducting an investigatory stop of a vehicle where they received information from an informant that two men would be selling cocaine in a certain area from an older model Pontiac LeMans automobile in poor condition. The informant also told the police that in the vehicle there would be cocaine, coffee creamer to cut the drug, and a scale in a green plastic container; and that the informant had seen the two men selling cocaine from the car within the past twenty-four hours.

In Commonwealth v. Ciaramitaro, 26 Mass. App. Ct. 110, 115 (1988), a police officer received information from two informants, both of whom were known to the officer but unknown to each other and acting independently, indicating that the defendants were going to travel by automobile to New York City around midnight to purchase heroin. During surveillance of the defendant's home, the officer observed the defendants leave shortly after midnight and proceed by way of a certain described route and automobile. The police conducted a threshold inquiry of the defendants the next day

as they returned by the same route and vehicle. The Court held that the threshold inquiry was proper due to the corroborating statements of the informants which were confirmed in significant predictive respects by the officer's surveillance.

4. Information Through Police Channels

Information received from other police officers or law enforcement agencies may contribute to an officer's reasonable suspicion that a particular person is involved in criminal behavior. If either a threshold inquiry or seizure amounting to an arrest is made based solely on information received via police channels, the person providing the information must have the required reasonable suspicion for the threshold inquiry or probable cause for the seizure. Whiteley v. Warden, 401 U.S. 460 (1971); Commonwealth v. Antobenedetto, 366 Mass. 51, 55 (1974); Commonwealth v. Fraser, supra, at 546 (in making a Terry stop in reliance upon a "wanted flyer" issued by another police department, the stop will be upheld if, among other things, the police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop); Commonwealth v. White, 422 Mass. 487, 497 (1996) (police had reasonable suspicion to stop vehicle suspected to be involved in a homicide where radio broadcast describing the vehicle was based on information from percipient witness interviews and independent police observations). In contrast, the court in Commonwealth v. Medeiros, 45 Mass. App. Ct. 240, 242 (1998), held that police did not have reasonable articulable suspicion to stop a defendant based on unidentified call at

8 p.m. that an occupant of a white Monte-Carlo with a certain plate number was knocking on doors and asking if anyone wanted snow shoveled. There was no corroboration to support the reliability of the tip and there was no recent crime wave or any suspicious activity. Medeiros, 45 Mass. App. Ct at. 242. See also Commonwealth v. Badore, 47 Mass. App. Ct. 600, 603-604 (1999) (officers, who responded to report of a "disturbance" and saw a motor vehicle parked too far from curb, unlawfully seized the motor vehicle by blocking its path because they did not see any disturbance nor have any information that the occupants had been the source of the disturbance complaint).

Information received at roll call that a certain person known to the officer might be at a specific location during the shift selling drugs, combined with a later sighting of the suspect at that location, justified conducting a threshold inquiry in Commonwealth v. Crowley, 13 Mass. App. Ct. 915 (1982). Similarly, in Commonwealth v. Dottin, 353 Mass. 439, 441 (1968), a police officer was informed at roll call that several housebreaks had occurred in an area and that a taxicab had been used to transport the stolen goods. An investigative stop was justified when the officer later observed a taxicab pulling away from a house with a television set on the front seat and three men in the rear. See also Commonwealth v. Varnum, 39 Mass. App. Ct. 571, 574 (1995) (radio transmission identifying defendant's car and probable involvement in an out-of-state burglary that day coupled with police observations of suspicious conduct by occupants of the car warranted investigative stop and

inquiry); Commonwealth v. Willis, 415 Mass. 814, 818 (1993) (teletype from Michigan police based on tip from unnamed informant provided sufficient reasonable suspicion that defendant had committed or was committing a crime, in light of independent police corroboration).

5. Reliable Reports of Weapons

Be aware, however, the Supreme Judicial Court has said that information that a person is seen in public with a handgun, absent other suspicious conduct, is insufficient to warrant a Terry stop for a weapons violation. Commonwealth v. Couture, 407 Mass. 178, 183 (1990). See Commonwealth v. Alvarado, 423 Mass. 266 (1996) (absent additional suspicious activity, an anonymous tip that a person had a handgun wrapped in a towel in a car was insufficient to warrant an investigatory stop by police because that did not disclose any imminent threat to public safety); Commonwealth v. Bermont, 39 Mass. App. Ct. 522 (1996) (police responding to radio report of "a man waving a gun" without further description were not justified in approaching and pat-frisking the defendant and companions without other facts indicating suspicious behavior).

However, if police are looking for a particular type of weapon which is extremely lethal, the stop may be justified. In Commonwealth v. Alvarado, 427 Mass. 277 (1998), the Supreme Judicial Court stated that a reliable report of someone carrying a sawed-off shotgun "stands on much different footing than a report that someone might be carrying a handgun." Alvarado, 427 Mass. at 281-282. The court reasoned that a sawed-off shotgun "is an extremely

lethal weapon which poses 'an ominous threat in and [of] itself.'" Id. The threat to public safety satisfies the requirement of a nexus to criminal activity. Alvarado, 427 Mass. at 283.

B. Motor Vehicle Stops

1. Grounds for Stop

Every motor vehicle stop is a seizure. Colorado v. Bannister, 449 U.S. 1, 4 at n.3 (1980). As such, only those stops which are reasonable are lawful. Probably the most typical situation involving the stop of an automobile is when a police officer observes a traffic violation while on duty. In such a case, the violation in and of itself provides reasonable suspicion to warrant an investigatory stop. Commonwealth v. Heughan, supra, at 104. See Commonwealth v. Baez, Jr., 47 Mass. App. Ct. 115, 118 (1999) (officer had reasonable articulable suspicion to stop motor vehicle based on his visual observations and opinion that tinting of windows exceeded permissible limits). Compare Commonwealth v. Santana, 420 Mass. 205, 207-208 (1995) (upholding stop of vehicle with unlawful vehicular defect), with Commonwealth v. Kimball, 37 Mass. App. Ct. 604, 606 (1994) (disallowing stop of generally dilapidated car).

There are also many other situations which will warrant the stop of a motor vehicle and a check of the driver or other occupants. For example, in Commonwealth v. Otero, 20 Mass. App. Ct. 581, 584 (1985), a police officer pulled alongside a car traveling well below the posted speed and shined his light into the other car. The officer observed the two occupants passing a small object back and forth.

These observations, in light of the officer's experience, were enough to warrant a stop to check for drug use and possession. In Commonwealth v. Fitzgibbons, 23 Mass. App. Ct. 301, 307 (1986), the police were warranted in stopping a motor vehicle where they had received a report, just minutes before, that the driver had threatened a number of bystanders by flashing a handgun out the window of his car while driving down a busy city street.

The courts also permit stops conducted pursuant to justified and established police policy. In Commonwealth v. Laaman, 25 Mass. App. Ct. 354, 365 (1988), a police officer approached an occupied motor vehicle parked in a highway rest area at 2:00 a.m. on a winter evening. The officer was acting pursuant to a departmental policy which required a check of all parked and occupied cars in the winter months to determine whether the occupants were in need of assistance. The court held that the stop was reasonable, and thus lawful, since the underlying policy served a legitimate purpose and the length of the specific inquiry was brief. In Commonwealth v. Tompert, 27 Mass. App. Ct. 804, 808 (1989), the court permitted a trooper who approached a car pursuant to a similar policy to open the car door and order the occupants out. The court reasoned that the trooper was justified in fearing for his safety since he was alone at night in a rest area and he observed furtive movements of the occupants as he approached the vehicle. The key to the success of these type of "stops" appears to be that the initial decision to conduct the inquiry was based upon an established policy designed to

further a legitimate governmental interest. See also Commonwealth v. King, 389 Mass. 233, 242 (1983).

2. Length of Stop

In a routine traffic stop, a police inquiry must end after the operator produces a valid license and registration unless the police have specific and articulable grounds for inferring that either the operator or the passenger(s) were involved in criminal behavior or that the safety of the officer or others is in jeopardy. Commonwealth v. Gonsalves, 429 Mass. 658, 661 (1999); Commonwealth v. Torres, 424 Mass. 153, 157-158 (1992).

3. Ordering Occupants out of the Vehicle

A passenger has a higher expectation of privacy than the operator. A passenger, "in the absence of his own individual misbehavior or suspicious conduct, could expect that the formalities involved in the traffic stop would take place solely between the driver and the trooper." Id. See Commonwealth v. Alvarez, 44 Mass. App. Ct. 531, 534-535 (1998) (proper to stop motor vehicle for speeding but asking passenger for identification was an unlawful seizure); Commonwealth v. Prevost, 44 Mass. App. Ct. 398 (1998) (officer justified in ordering passenger out of car and to open his coat when, following lawful stop, officer observed passenger bend down and struggle to put on overcoat); Commonwealth v. Ellsworth, 41 Mass. App. Ct. 554, 556-557 (1996) (officer who observed passenger's furtive movements may order occupants out of car, so long as order occurs prior to end of legitimate inquiry of operator). Contrast Gonsalves, 429 Mass. at 659-663 (trooper was not justified

in ordering passenger out of cab just because passenger "appeared nervous"); Commonwealth v. Williams, 46 Mass. App. Ct. 181, 182 (1999) (officer justified in stopping motor vehicle for failure to signal but not in ordering driver to exit based solely on him acting "suspicious, nervous and moving around").

4. Extraterritorial Stops Not Permitted

No reported Massachusetts case has permitted police officers to make an extra-territorial stop on the basis of reasonable suspicion alone. However, an officer may make an arrest as a result of "extraterritorial fresh pursuit" for any arrestable offense, whether felony or misdemeanor, initially committed in the arresting officer's presence and within his jurisdiction. G.L. c. 41, §98A. See Commonwealth v. LeBlanc, 407 Mass. 70, 71 (1990). Courts have been lenient in finding that an officer's observations in his own jurisdiction provided probable cause for arrest. See Commonwealth v. Trudel, 42 Mass. App. Ct. 903 (1997).

For example, in Commonwealth v. O'Hara, 30 Mass. App. Ct. 608 (1991), the Appeals Court upheld an extra-territorial stop made when an officer, at 3:15 a.m., observed the defendant greatly vary his speeds and cross the center line on a couple of occasions. Suspecting that the operator was under the influence of alcohol or drugs, the officer followed in fresh pursuit over his town line three hundred feet into the neighboring city and stopped the vehicle. The Appeals Court upheld the officer's conduct because he had probable cause that the defendant had committed an arrestable offense. Supra, at 610.

In Commonwealth v. Claiborne, 423 Mass. 275 (1996), the Court held that although outside their jurisdiction and not in "fresh and continuous pursuit," officers properly made a warrantless arrest where probable cause existed to believe that a felony had just been committed. While responding to a radio transmission of an armed robbery and description of the defendant and car, police intercepted the defendant when they passed through a neighboring jurisdiction in anticipation of the route the defendant would attempt. The Court reasoned that once outside their territory, the police functioned as "private citizens," but only required probable cause for a warrantless arrest. Id. at 280. See Commonwealth v. Morrissey, 422 Mass. 1 (1996) (officer who had reason to believe defendant was OUI had authority to stop the defendant to make an investigative inquiry and transferred that authority pursuant to G.L. c. 268, § 24 to an officer in another jurisdiction who effected the stop); Commonwealth v. Gray, 423 Mass. 293 (1996) (plainclothes officer who displayed his police badge by holding it against the window while in his jurisdiction, and was in "fresh and continuous pursuit," had authority to make an extraterritorial arrest of speeding motorist who had refused to stop).

In Commonwealth v. Zirpolo, 37 Mass. App. Ct. 307, 310-311 (1994), the Appeals Court upheld a similar stop where the arresting officer did not himself observe the defendant commit an arrestable offense but had a reasonable suspicion that the defendant had committed an arrestable offense within his jurisdiction and in the presence of a

fellow officer. The fellow officer reported the offense over his police radio and the arresting officer overheard it. On the basis of the radio broadcast, the arresting officer pursued the defendant's car and stopped it outside his territorial jurisdiction. The court reasoned that the arresting officer, as a result of the radio communication that he heard in his own jurisdiction, "had reason to believe that the suspect ha[d] committed an arrestable offense ... before he pursued and arrested the defendant" in a neighboring jurisdiction.

C. Stops to Investigate Possible OUI Offense

This section outlines some of the restrictions that Massachusetts law imposes on police officers who have reasonable suspicion that an operator is under the influence of alcohol or drugs.

1. Field Sobriety Tests

Upon reasonable suspicion that an operator is under the influence, an officer may ask the operator to perform one or more field sobriety tests. Technically, the operator has no legal right to refuse to perform the tests in that circumstance. Commonwealth v. Blais, 428 Mass. 294, 302 (1998). Accordingly, an officer is under no obligation to inform a driver that he can refuse to take the tests. Blais, 428 Mass. at 299. However, an officer is not allowed to use force to compel performance of the tests. Id. at 301; Commonwealth v. McGrail, 419 Mass. 774, 779 (1995).

Under Massachusetts Constitutional law, if the operator refuses to perform the tests, evidence of that refusal is not admissible against him in any subsequent criminal

proceeding. Id. at 780. The Court reasoned that the refusal is testimonial because it is the equivalent of a statement by the defendant that "I have had so much to drink that I know or at least suspect that I am unable to pass the test," and is compelled because the defendant is forced to choose between failing the tests, thereby furnishing "real" evidence against himself, or refusing to perform the tests, thereby furnishing testimonial evidence against himself. McGrail, 419 Mass. at 778-780.

If the operator agrees to perform the field sobriety tests, the results are admissible against him in a subsequent criminal proceeding because such tests provide real rather than testimonial evidence. McGrail, supra at 777 n. 7. Commonwealth v. Brennan, 386 Mass. 772, 779, 783 (1982). See Commonwealth v. Mahoney, 400 Mass. 524, 526-529 (1987) (videotape of suspect's booking on OUI arrest is real evidence and is not protected by privilege).

Because routine traffic stops are considered noncustodial, police are not required to recite Miranda warnings prior to conducting on-the-scene questioning and prior to requesting that the defendant perform field sobriety tests, including the alphabet test. Blais, 428 Mass. at 299; Vanhouton v. Commonwealth, 424 Mass. 327 (1997). See also Commonwealth v. D'Agostino, 38 Mass. App. Ct. 206, 208 (1995).

2. Blood Alcohol Test

An operator is deemed to have consented to a chemical analysis of his breath or blood if he is arrested for driving while intoxicated. G.L. c. 90, §24 (1)(f)(1). If

a suspect refuses to submit to a test, after being warned of the consequences of refusal, his license is subject to automatic suspension for one hundred and twenty days. Id. The period of suspension may be longer if the suspect is under twenty-one years of age or has prior convictions for driving while intoxicated. Id.

Although police are required to warn a suspect of the consequences of refusing to submit to a blood alcohol test, they need not warn the suspect that a failure to pass the test will result in a partial suspension of driving privileges for up to ninety days. G.L. c. 90, §24(1)(f)(1) & (2)(iv). Commonwealth v. Crowell, 403 Mass. 381, 386 (1988). The right to refuse to take the test is statutory, not constitutional, and thus a "knowing and intelligent" waiver of the suspect's right is not required prior to taking the test. Commonwealth v. Davidson, 27 Mass. App. Ct. 846, 848-849 (1989). Instead, a court will examine traditional indicia of waiver, e.g., waiver by inaction, by express agreement, by untimely motion, and by failure to object. Commonwealth v. Davidson, supra at 848.

An individual's privilege against self-incrimination, provided by the Fifth and Fourteenth Amendments to the United States Constitution and art. 12 of the Declaration of Rights of the Massachusetts Constitution, does not apply to the results of chemical blood alcohol tests (e.g. breathalyzer). G.L. c. 90, §24(1)(e). Commonwealth v. Brennan, 386 Mass. 772 (1982). The same constitutional provision that prohibits the evidentiary use of a criminal defendant's refusal to take a field sobriety test also

prohibits the evidentiary use of a refusal to take a breathalyzer test. Opinion of the Justices, 412 Mass. 1201, 1211 (1992). See G.L. c. 90, §24(1)(e).

3. Access to Independent Examination by Physician

When a suspect is held in custody, charged with an OUI offense, he must be advised at the time of booking of his right to be examined by a physician selected by him. G.L. c. 263, §5A. Commonwealth v. King, 429 Mass. 169, 172 (1999); Commonwealth v. Andrade, 389 Mass. 874, 876-877, 879 (1983). Further, although it is not constitutionally or statutorily mandated, the Appeals Court has noted that it would be "sound practice" if police were to notify the defendant specifically of his right to an independent blood test. Commonwealth v. Madden, 28 Mass. App. Ct. 975, 976 (1990). While the police have no obligation to assist the defendant in arranging or obtaining the examination, they must afford him, absent exigent circumstances, "a reasonable opportunity" to exercise his right to the examination, e.g., provide him with access to a telephone, and they may not hinder his attempts to obtain the examination. G.L. c. 263, §5A. King, 439 Mass. at 172-173; Commonwealth v. Hampe, 419 Mass. 514, 521 (1995); Commonwealth v. Rosewarne, 410 Mass. 53, 55 (1991); Commonwealth v. Durning, 406 Mass. 485, 493 n. 8 (1990). The remedy for a violation of §5A will depend on several factors, including the police conduct which led to the violation, any exigent circumstances, and the amount of admissible evidence demonstrating the defendant's guilt. Rosewarne, supra at 56-57 & n.3. See Commonwealth v. Priestly, 419 Mass. 678 (1995) (even if defendant's right

under G.L. c. 263, §5A was violated, dismissal was not required because evidence of the defendant's guilt was overwhelming).

In Commonwealth v. Hampe, supra, the Supreme Judicial Court held that, "in order for G.L. c. 263, §5A, to have its intended force and effect, it must be read as requiring the police to telephone a bail commissioner or to allow the defendant to do so." Id. at 518. The court concluded that, although the police "do not have to help the defendant by transporting him to the hospital, it remains true that, absent exigent circumstances, the police should telephone a bail commissioner or other authorized person, when courts are not in session, to facilitate a defendant's release in a timely fashion, or at least to allow him to make his own arrangements for a hearing on bail. The police should advise the defendant of this right at the time of booking." Id. at 521.

Furthermore, when the police make the call to the bail commissioner, they must inform the bail commissioner that the defendant wishes to exercise the right to an independent medical examination if that wish has been conveyed to police. King, 429 Mass. at 176. The bail commissioner may not refuse to conduct a prompt bail hearing because such a refusal frustrates the defendant's right to a prompt independent examination. King, 429 Mass. at 173-177. Any policy whereby a magistrate postpones a bail hearing and instructs the police to hold a defendant until the defendant "sobers up" must be abandoned. Id.

IV. SEIZURE V. ARREST - REASONABLENESS IN EFFECTING THE STOP

In some situations it is difficult to discern whether the detention of an individual for questioning is a stop or an arrest. Though both actions permit the detention of the suspect, the distinction is critical because the standard of justification for an arrest (probable cause) is significantly higher than that required for a threshold inquiry (reasonable suspicion). Thus, a stop which could have been carried out with a lesser show of force, or in a more expedient manner, may be subjected to a court challenge on the grounds that the stop was actually an arrest which occurred without probable cause. See Commonwealth v. Willis, 415 Mass. 814, 819-820 (1993) ("in deciding whether this encounter was an arrest or "merely" a stop, we do not apply a bright line test. The answer depends on the proportional relationship of the degree of intrusiveness on the defendant to the degree of suspicion that prompted the intrusion.")

Just as the courts apply a test of "reasonableness" when determining whether an officer's level of suspicion was adequate to warrant a Terry stop in the first place, the courts look to the reasonableness of the manner in which the stop itself is effectuated. Thus, a court will consider the nature of the investigation, the manner in which the stop was initiated, the length of the detention, and the availability of alternative courses of conduct to determine whether the stop itself was reasonable. The more proportionate the actions of the police are to the

circumstances of the case, the more likely the stop will be considered lawful.

To the extent reasonably possible, police officers conducting investigative stops should minimize the show of force, the length of the stop, the level of intrusion, and should strive to avoid moving the suspect from the scene of the detention to the police station or any other location. Otherwise, the stop, if challenged, may be considered an arrest and any information gained as a result will be subject to suppression if there was insufficient probable cause to make an arrest.

A. Show Of Force

There is no hard and fast rule concerning the amount of force which is appropriate during an investigative stop. The key is that the force used must be "proportional to the degree of suspicion that prompted the intrusion," Commonwealth v. Fitzgibbons, 23 Mass. App. Ct. 301, 307 (1986), and police are entitled to take reasonable precautions for their protection. Commonwealth v. Willis, 415 Mass. 814, 820 (1993).

Where the circumstances warrant, the officer may display force in effecting the stop. The showing of a firearm or presence of numerous officers will be warranted when stopping an individual suspected of participation in a crime often associated with weapons -- murder, rape, robbery, drug trafficking, etc. In such a situation, the officer may take reasonable precautions to insure her own safety. However, should the showing of force be excessive under the circumstances, a court might conclude that the stop was

actually an arrest and thus justifiable only if supported by probable cause to arrest.

An armed show of force to effect a stop was recently approved by the Supreme Judicial court in Commonwealth v. Alvarado, 427 Mass. 277, 284-185 (1998). In Alvarado, the court found that reliable information from an eyewitness that the defendant and his companions may have had a sawed-off shotgun -- a "highly dangerous" weapon -- in their car provided police with "ample justification" to draw their weapons while ordering the men out of their car as a precaution against the use of the shotgun by one of the men. Alvarado, 427 Mass. at 282, 284-285. The concept of proportionality with regard to the amount of force used to effectuate a Terry stop was also discussed in Commonwealth v. Blake, 23 Mass. App. Ct. 456, 461 (1987). Acting on an informant's tip that the defendants were dealing drugs from a car, the police in Blake stopped the car and positioned their cruiser in such a manner as to prevent the car from driving away. The police then approached the defendants seated in the car without drawing their weapons. The court found the police conduct there to be reasonably proportionate under the circumstances given the risk of an attempted escape and danger of an ensuing chase.

A similar result was reached in Commonwealth v. Fitzgibbons, 23 Mass. App. Ct. 301, 308 (1986). There, police received a radio dispatch giving a description of the person wanted in connection with carrying a handgun unlawfully and assault with a dangerous weapon. The officers proceeded on a course to intercept the alleged

defendant and within minutes spotted the defendant's vehicle. The vehicle had the same license plate number as the description. It was at this time that the officers formed a box around the defendant's vehicle with their cruisers and forced him to the side of the road. One of the officers then drew his service revolver, approached the driver's door, and ordered the defendant out of the vehicle. The stop was held to be a lawful Terry stop and not an arrest, because the intrusion was temporary and even though the officers used relatively great force, the degree of force was not excessive given that the police were confronting a person who allegedly pointed an automatic weapon at a group of citizens and thereafter fled the scene. See also Commonwealth v. Andrews, 34 Mass. App. Ct. 324 (1993) (lone police officer acted properly in blocking defendant's vehicle and holding four occupants at gunpoint when officer had reasonable suspicion that defendant had been involved in an armed robbery); Commonwealth v. Willis, 415 Mass. 814, 820 (1993) (officers did not use excessive force when three officers drew, but did not point guns and followed defendant when he exited a bus because the force used was reasonable based on safety concerns stemming from detailed tip from Michigan police department that defendant would be armed).

In contrast, in Commonwealth v. Bottari, 395 Mass. 777, 782 (1985), police acting on an informant's tip that the suspect owned an unregistered hand gun, waited near suspect's car for his return. When the suspect entered his car, police blocked its way with their cruiser and ordered

the suspect out at gunpoint. The Court held that, given the information possessed by the police at the time of the stop, the force was excessive for a stop and constituted an arrest without probable cause.

B. Use Of Force

As a general rule, the use (as opposed to show) of force during a threshold inquiry is not lawful. In Commonwealth v. Borges, 395 Mass. 788, 790 (1985), police stopped a suspect based on an informant's tip that he was selling heroin. The police ordered the suspect to remove his shoes and then continued their inquiry. The Court held the police had exceeded the bounds of an investigatory stop, and probable cause for detaining the suspect was required.

However, in rare situations where the criminal activity is thought to be of a very serious nature, there is a real concern for safety, and exigent circumstances exist, courts will uphold the reasonable use of force. In Commonwealth v. Moses, 408 Mass. 136, 141 (1990), the Supreme Judicial Court held that it was reasonable for an officer, investigating a suspected drug deal, to take the defendant/driver's car keys at the outset of the officer's inquiry, where the officer was outnumbered three to one and the suspects were believed to be armed. In Commonwealth v. Andrews, 34 Mass. App. Ct. 324 (1993), the Appeals Court found it was reasonable for back up officers to pat frisk and handcuff four men who had previously been held at gunpoint by one officer. The court found that safety concerns justified the frisk, and that handcuffing was a legitimate response to the problem of controlling four potentially armed individuals.

C. Length Of Detention

Similarly, prolonging a stop unnecessarily can cause the investigative stop to become an arrest. Notwithstanding the unusual cases, a Terry stop may take no longer than necessary to investigate the circumstances which gave rise to the officer's suspicions. In Florida v. Royer, 460 U.S. 491 (1983), the United States Supreme Court held that a fifteen minute threshold inquiry was too long where the police had moved the suspect to a private room in an airport for questioning. The seizure was further prolonged by a decision to seize the suspect's luggage at the baggage claim area after gaining permission to search it. Though the initial stop was considered valid, the Court concluded it became, in effect, an arrest because less intrusive and more expeditious methods of investigation could have been employed. Had the questioning taken place in the public concourse where the stop originated and a drug sniffing dog been used to smell the luggage in the baggage claim area, the length of the stop could have been reduced and the need to transport the defendant eliminated. Royer, supra at 501-507. See also United States v. Place, 462 U.S. 696, 709 (1983) (ninety minute seizure of an airline passenger's luggage was too long under the circumstances).

The United States Supreme Court has refused to set a maximum time limit on the length of an investigative stop, stating instead that the permissible duration of a threshold inquiry is dependent upon the facts and circumstances of each case. In United States v. Montoya De Hernandez, 473 U.S. 531 (1985), the defendant was stopped by customs

officials after she arrived on a flight from Bogota, Colombia. She was suspected of smuggling narcotics into the country hidden in her body cavities. She was given the option of returning to Colombia on the next available flight, agreeing to an x-ray, or remaining in detention until she produced a "monitored" bowel movement. The defendant chose the first option, but the police could not get her on a flight. After sixteen hours, a court-ordered rectal examination resulted in obtaining 88 cocaine filled balloons. In its opinion, the Court noted several factors in upholding the sixteen hour detention: this type of smuggling cannot be readily detected; the defendant had made frequent recent trips from Colombia; she spoke no English and carried only her passport and \$5,000.00 in cash.

In Commonwealth v. Sanderson, 398 Mass. 761 (1986), six state police troopers stopped an automobile, boxed it in with their cruisers, and detained it and its operator for forty minutes while the officers waited for a drug-sniffing canine to arrive at the scene. The troopers told the driver he was under investigation for drug trafficking and gave him the Miranda warnings. The Supreme Judicial Court found that the police action was tantamount to an arrest rather than a brief investigative stop because a reasonable person would have believed that he was actually under arrest. Because the police lacked probable cause to arrest the suspect, the defendant's motion to suppress the drugs seized was allowed. See also Commonwealth v. Stawarz, 32 Mass. App. Ct. 211, 213-214 (1992). In Commonwealth v. Owens, 414 Mass. 595, 599-600 (1993), the Supreme Judicial Court found that an

officer had probable cause to arrest the defendant, whom the officer pursued into a neighboring jurisdiction. It was immaterial that the officer may have subjectively intended only to make an investigative stop.

In Commonwealth v. Tosi, 14 Mass. App. Ct. 1029, 1030 (1982), a twenty-five minute detention was deemed reasonable because a need arose to transport a witness to the scene of the stop for identification of stolen property. Likewise, in Commonwealth v. Modica, 24 Mass. App. Ct. 334, 339 (1987), where police stopped a car believed to be transporting stolen property, the court concluded that the detention and inquiry by the police did not exceed reasonable bounds, as measured by the information known and the purpose of the stop. The car was stopped only for the length of time it took the officer to check the driver's license and registration and for the investigative officer to arrive.

D. Moving The Suspect Away From The Scene

Because a threshold inquiry is a seizure based on less than probable cause, the police must minimize the extent of the intrusion if the stop is to be considered reasonable within the meaning of the Fourth Amendment. Thus, a suspect should be moved away from the place at which he is stopped only when exigent circumstances exist or no less expedient and intrusive means of investigation are available. Should a court later conclude that a move was unwarranted, the seizure will be deemed unlawful unless the government can demonstrate that the stop was based upon the higher standard of probable cause to arrest.

The United States Supreme Court decision in Florida v. Royer indicates that the justification for any move will be closely scrutinized. Having stopped an individual in an airport's public concourse, the police officers moved the suspect to a room forty feet away in order to conduct the investigation in a private setting. Stating that the move was not necessary for the protection of the officers and that the questioning could have been conducted without moving the suspect out of the concourse, the Court held that the intrusion exceeded the permissible limits of a threshold inquiry. Royer, supra at 503. In Dunaway v. New York, 442 U.S. 200, 216 (1979), the Supreme Court held that bringing a suspect to the police station for questioning constituted an arrest.

Police officers must minimize the length of the detention by moving the suspect no further than necessary to ensure their safety or to advance some other important interest. While moving several feet or driving several blocks away from the initial scene may not automatically convert a stop into an arrest, moving a suspect to the police station is so comparable to an arrest that it should be supported by probable cause.

Asking a suspect to come out of a barroom to the street, Commonwealth v. Salerno, 356 Mass. 642, 646 (1970), or walking a suspect from the street back into the bank from which he had just exited, Commonwealth v. Crowley, 29 Mass. App. Ct. 1, 4-6 (1990), were considered reasonable investigative measures when used to have witnesses identify a suspect. In Crowley, the Court noted that moving the

witnesses to the suspect is a less intrusive procedure. Crowley, supra at 5.

Similarly, where the suspect voluntarily consents to move to an area away from the scene of the stop such action would not be held unreasonable. United States v. Mendenhall, 446 U.S. 544, 557 (1980). However, if the circumstances suggest that the individual may not have reasonably believed that he was free to refuse the police request, the "consent" and thus the movement will not have been valid. In Commonwealth v. Corriveau, 396 Mass. 319, 327 (1985), the court determined that the defendant who voluntarily accompanied the police to the station house to answer questions was not in a custodial situation until after he voluntarily consented to a benzidine test, which revealed the presence of blood on his hands. Because the defendant voluntarily accompanied the police to the station, a custodial detention was not in effect. The defendant was not placed under arrest until the results of the test came back positive, at which time they had probable cause to make the arrest.

E. Miranda Rights

Because threshold inquiries are non-custodial seizures, police are not obligated to advise suspects of their Miranda rights prior to questioning. Berkemer v. McCarty, 468 U.S. 420, 442 (1984); Commonwealth v. Shine, 398 Mass. 641, 647-649 (1986) (Miranda warnings not required prior to preliminary questions designed to determine the defendant's identity and what he knew about the crime). However, should an officer restrain a person beyond the extent minimally

necessary to the stop, a custodial situation may exist in which Miranda will apply.

V. THE FRISK FOR WEAPONS

Where an officer conducting a threshold inquiry has a reasonable belief that his safety or that of others nearby is in jeopardy because a suspect may be armed and dangerous, a frisk for weapons is permissible. In Terry v. Ohio, because the officer believed that a robbery was about to occur -- a crime often involving firearms -- he was justified in frisking the suspects for weapons prior to questioning. Terry, supra at 28.

A. Reasonable Suspicion That The Suspect Is Armed

A police officer may only conduct a frisk for weapons during a threshold inquiry if she has reasonably concluded on the basis of specific and articulable facts that the suspect is armed and dangerous. Sibron v. New York, 392 U.S. 40, 63 (1968); Commonwealth v. Ballou, 350 Mass. 751, 756 (1966). An officer must carefully document the reasons for a frisk to protect against a court's later concluding it was based on "mere hunch." See Commonwealth v. Davis, 41 Mass. App. Ct. 793, 795 (1996).

Perhaps the most common situation which justifies a frisk occurs when a police officer stops someone suspected of involvement in a crime of violence or major drug trafficking. Because these types of offenses commonly involve weapons, it is reasonable to frisk a detainee suspected of such a crime. Apart from the nature of the act for which the person is being questioned, various other

circumstances and observations may warrant a belief that a suspect is armed. These include:

- observation of bulges in the suspect's clothing;
- observation of an object which might be a weapon;
- otherwise inexplicable sudden movement towards a pocket or other place where a weapon could be concealed;
- awareness that the suspect has been armed in the past;
- reliable information that the suspect is armed;
- a police officer's reasonable belief that he is in danger.

In Adams v. Williams, 407 U.S. 143, 148 (1971), an officer received information from a person known to him that the occupant of a car parked nearby was carrying narcotics and a gun. The officer approached the vehicle and asked the operator to exit. The Supreme Court held that the officer was reasonable in reaching into the vehicle and seizing the gun holstered at the operator's waist when the suspect refused to step out of the vehicle. The information provided to the officer and the refusal to comply with the request created a reasonable belief that the motorist was armed. In Commonwealth v. McCauley, 11 Mass. App. Ct. 780, 783 (1981), police were dispatched to a bar after receiving a phone tip describing a man in the bar that had twice dropped a firearm on the floor. On the basis of the tip, the hour of the night, and the possibility that the suspect was drunk, the court concluded that both the threshold inquiry and the frisk for weapons were reasonable.

While it is settled that even reliable information that a person is carrying a firearm is not a sufficient basis to

provide reasonable suspicion of criminal activity to justify a stop or frisk, Couture, 407 Mass. at 181, sawed-off shotguns are viewed differently. In Commonwealth v. Alvarado, 427 Mass. 277 (1998), reliable information from a known, disinterested citizen that a front seat passenger in a described vehicle had an apparent sawed-off shotgun, gave police the requisite suspicion to stop the car, order the occupants to exit and, frisk them for the weapon.

The court in Commonwealth v. Jones, 21 Mass. App. Ct. 910, 911 (1985), ruled that a police officer, upon receiving information from a reliable informant that the defendant was carrying a firearm, was justified in stopping the defendant and patting him down before he asked for the defendant's identification. And in Commonwealth v. Andrews, 403 Mass. 441, 460 (1988), a weapons frisk was upheld where the police received a complaint from a woman that the defendant had just threatened to kill her and her two children "just as he had killed two men in Plymouth." The women had also told the police that they would find the defendant nearby sleeping in his automobile.

A frisk for weapons was deemed improper in Commonwealth v. Crowley, 13 Mass. App. Ct. 915 (1982). Suspecting the defendant to be selling small quantities of drugs on the street, the police conducted a stop and frisk. While the stop was proper, the court said of the frisk:

Prior to the frisk, neither facts known by the officer before the stop . . . nor the defendant's reputation . . . nor the defendant's demeanor during the stop . . . could reasonably have put the officer in fear of his safety or have furnished him with reason

to believe that the defendant was an armed and dangerous individual. Id.

The Court was of the opinion that a suspicion of distribution of a small amount of drugs, by itself, was not enough to warrant a frisk. Id. In Commonwealth v. Gutierrez, 26 Mass. App. Ct. 42, 47 (1988), the Court held that although the police properly conducted a threshold inquiry of the defendant, their search for weapons was not proper. The Court noted that the police were not concerned for their safety, since they had detained the defendant for five to ten minutes without frisking him. Moreover, the police knew the defendant had just flown from New York and had presumably been through a metal detector. Id. While the police did observe a bulge at the waistline of the defendant's pants, they did not discover the bulge until after they conducted an improper search of the defendant's coat pockets.

In general, courts are acutely aware of the dangers facing police officers and often will defer to a police officer's assessment of dangerousness. See Commonwealth v. Prevost, 44 Mass. App. Ct. 398, 401-402 (1992). In Prevost, police officers were justified in opening a car door, asking a passenger to exit the car and open his coat to determine if the passenger was concealing anything. Just prior to the lawful stop of the vehicle, the officer saw the front seat passenger bend over and reach beneath his seat. As the officer approached the passenger side of the car, he observed the defendant struggling to put on an overcoat. The court ruled that these furtive movements justified the officer's concern for his safety.

In a similar case, Commonwealth v. Rivera, 33 Mass. App. Ct. 311 (1992), a lone police officer stopped a car with four occupants at 11:20 a.m. for speeding. When the officer turned on his blue flashing lights, a backseat passenger (the defendant) looked back and then bent forward, as if to put something on the floor. While the officer was properly questioning the driver and front seat passenger (who identified the driver who had no license with him), he noticed an aluminum bat sticking out from under the seat in front of the defendant. The officer, who knew that another police officer had recently been beaten to death by an aluminum baseball bat during a routine traffic stop, then saw the defendant pick up a "boom box." The officer frisked the defendant. The Court found that the defendant's behavior, coupled with the officer's being alone and his knowledge of the recent fatal bludgeoning of an officer with an aluminum baseball bat, made it reasonable for the officer to fear for his safety. Rivera, 33 Mass. App. Ct. at 314-315.

A suspect who either keeps or places his hands in his pockets will also increase an officer's reasonable fear for his safety. Commonwealth v. Fraser, 410 Mass. at 546 (1991); Commonwealth v. Patti, 31 Mass. App. Ct. at 443 (1991). For example, in Commonwealth v. Johnson, 413 Mass. 598 (1992), the defendant's speeding car nearly collided with an unmarked police vehicle. The officers activated their siren, placed a flashing light on their vehicle, and pursued the defendant over several streets. After a three to five minute chase involving speeds of up to fifty miles

an hour, a marked police cruiser forced the defendant's car to stop. As several officers approached the defendant's car, they saw him place "something" inside his pants' waistband. One officer drew his weapon and told the defendant to freeze and another officer removed the defendant from his vehicle and frisked him. In the defendant's pants, the officers found a plastic bag containing drugs and three bullets in a pouch. The motion judge found the frisk lawful but did not specifically find that the officers believed the bulge inside the defendant's pants was a weapon. The Supreme Judicial Court upheld the decision, finding that the frisk was justified because it was limited "strictly to what was minimally necessary to learn whether the defendant was armed." 413 Mass. at 601-602. See also Commonwealth v. Dedominicus, 42 Mass. App. Ct. 76, 80 (1997) (officer's need to take swift measures justified frisk to determine what defendant had concealed in his pants, even though motion judge had not specifically found that officer believed bulge was a weapon).

A frisk of a suspect may be proper when a person is first stopped, but a frisk after the subject has answered questions and provided identification may be improper. In Commonwealth v. Loughlin, 385 Mass. 60, 62 (1982), the officers observed a motor vehicle at 1:00 a.m. in the breakdown lane of a highway. The Court held that the officer was entitled to make an initial inquiry, but once the driver produced a valid license and registration, any justifiable investigation was complete and there was no need

for any further protective measures. In Commonwealth v. Lantigua, 38 Mass. App. Ct. 526, 528-529 (1995), the Court held that an officer could conduct a "Terry-type" search of accessible areas of a car during a lawful stop prior to allowing the driver to reenter the car to obtain the registration.

In Minnesota v. Dickerson, 124 L.Ed 2d 334 (1993), the United States Supreme Court unanimously ruled that the police do not need a warrant to seize contraband detected while frisking a suspect for possible concealed weapons, as long as the contraband is instantly recognizable by "plain feel." Although not binding authority, in Commonwealth v. Lopez (Super. 1996), a Superior Court Justice found that an officer's seizure of drugs based on their "plain feel" was legitimate. Given the officers' experience, his "tactile perception was as certain as his visual perception would have been."

B. Search Of The Suspect's Body

The scope of a search conducted as part of a threshold inquiry must be strictly justified by the circumstances which rendered its initiation permissible. Terry, supra at 29. Because the sole purpose of the search is the protection of the officer and nearby persons, it must be confined to areas from which the suspect could gain a weapon. Commonwealth v. Almeida, 373 Mass. 266, 272 (1977).

While the permissible scope is dependent upon the circumstances of each case, it will usually be limited to a pat-down (frisk) of the outer clothing of the suspect. Only if the pat-down indicates that a weapon is present do the

police have a privilege to search further. Terry, supra. Generally, an officer may only reach into a suspect's clothing if during the pat-down she feels a hard object of a shape and size causing a reasonable belief that it may be a weapon. In Commonwealth v. Silva, 366 Mass. 402, 408 (1974), the officer exceeded the permissible scope by examining the contents of a two ounce zipped pouch clearly too small to conceal a weapon.

C. Search Of The Suspect's Vehicle

In a limited number of situations, a search during a threshold inquiry may extend beyond the person to areas in which a weapon might be concealed. If a police officer reasonably fears that a vehicle's occupant may possess a weapon, interior areas in which a weapon might be concealed may be searched if the suspect is in the car, or if outside, may be expected to return to it shortly. In Commonwealth v. Moses, 408 Mass. at 143, the Supreme Judicial Court upheld the limited search of the interior of an automobile occupied by three men suspected of dealing drugs, where the officer, who was alone at the time of the stop, had observed furtive movements by the suspects as he approached the car. In Commonwealth v. Nutile, supra at 618-619, the Court held that the police were justified in searching a car because the police had seen the defendant get into his car with a gun in his waistband. During a lawful police pursuit, the officers saw the defendant throw objects from the car. After the stop and frisk of the defendant failed to locate the gun, the police opened a pouch which hung from the rear of the driver's seat (which turned out to contain drugs).

The Court found that the search of the car was lawful because the officers had reason to believe that the gun was either in the car or had been thrown from the car onto a public way.

In Commonwealth v. Lantigua, 38 Mass. App. Ct. 526 (1995), two police officers stopped the defendant's automobile for a traffic violation. The defendant exited the car when it stopped. The defendant was unable to produce a license but said that he would retrieve the car's registration from the glove compartment. As a safety precaution, one of the officers leaned into the driver's side of the automobile and looked into the interior of the car prior to allowing the defendant to retrieve his registration from the glove compartment. While leaning into the car, the officer saw a plastic bag of white powder in plain view on the floor of the car. When he opened the glove compartment, the officer saw a second bag of powder in plain view. The Appeals Court held that the search was justified and could be upheld either as a protective search for weapons or under caselaw which permits an officer to retrieve the registration himself once he discerns from the driver where it is located, rather than allowing the suspect to return to the automobile. See also Commonwealth v. Vanderlinde, 27 Mass. App. Ct. 1103, 1104 (1989) (police were justified in ordering the defendant out of his car and looking into the center console, where the defendant's car was stopped after a nighttime high speed chase, the three passengers appeared nervous, one in the rear seat made a

furtive gesture, and one in the front seat attempted to reach into the console).

The Court has also looked favorably upon a protective sweep of the interior of a motor vehicle where a police officer had placed the driver under arrest (on an outstanding warrant) but not the passenger. Commonwealth v. Robbins, 407 Mass. 147, 151-152 (1990). It was late at night, the officer was intending to let the passenger drive away with the motor vehicle, and as the officer had removed the driver from the car he saw protruding from the front seat what appeared to be a brown-handled object. The Court said that, under the circumstances, the police "were not required to gamble with their personal safety."

D. Search Of Articles Carried By The Suspect

If a suspect is believed to be armed and is carrying a bag which is capable of being patted down, this should be done. In Commonwealth v. Johnson, 36 Mass. App. Ct. 336, 337-338 (1994), a police officer was justified in patting down a handbag carried by a woman, when a known neighbor reported that the woman was carrying a handgun in her purse and the woman engaged in disorderly conduct. The court stated that "[i]n a potentially volatile situation an officer should not be required to wait to see if a suspected gun is drawn." If the article is hard, such as a briefcase, the police should remove the object from the person's reach during questioning. As this is a less intrusive means of denying access to a weapon concealed in a carried article, it is usually preferable to a full search. In Commonwealth v. Summerlin, 393 Mass. 127, 130 (1984), an officer was

justified in approaching an illegally parked car in a high crime area where shootings had occurred and, upon seeing a man join another in the car with a bag in his hand, open the passenger door and pat down the bag. The Court stated that the "officer could reasonably have taken into account the inordinate risk confronting an officer as he approaches a person seated in an automobile" and noted that the officer limited the pat down to the bag which was within the reach of the man in the car and opened the bag only when he felt a weapon inside.

If a threshold inquiry does not result in developing probable cause for an arrest, an officer may reasonably fear that the suspect might reach for a concealed weapon should a carried article (e.g. briefcase or purse) be returned at the conclusion of the inquiry. Though an unsettled area of the law, under these circumstances, a court might permit a protective search of a briefcase or purse before returning it to the suspect. If the police have a reasonable fear for their safety, based on specific and articulate facts, and no safe alternative exists, a search limited in scope to the extent necessary to locate a weapon concealed in a carried article should be conducted.

A warrantless search under similar circumstances was upheld in United States v. McClinnhan, 660 F.2d 500, 503 (D.C. Cir. 1981). Pursuant to a detailed anonymous tip which included information that an individual was carrying a concealed weapon, police officers stopped the individual, and after finding no weapons on his person, searched the briefcase. The court stated that the officers:

Had no suitable or safe alternative . . . merely separating McClinnhan from his briefcase . . . would obviate the danger only for the length of the stop; at some point they would be compelled to return the briefcase . . . and thus place themselves in the danger they sought to avoid.

E. Frisk Unaccompanied By A Stop

Virtually always, a frisk is preceded by a stop. However, there will occasionally be situations in which an officer may pat down a suspect in the course of a non-seizure field interrogation. In Commonwealth v. Fraser, 410 Mass. 541, 542-546 (1991), two police officers on patrol received a radio call about a man with a gun in a brown Toyota on an identified street in a high crime area. At that location, the officers saw a group of young men, including the defendant, but no brown Toyota. Upon seeing the defendant bend down behind a white pickup truck as if to deposit or retrieve an object, the officers approached. The defendant stood up with his hands inside his coat pockets. One officer then frisked the defendant and found a loaded handgun. The Supreme Judicial Court found that, prior to the frisk, the defendant was not seized. Because the officers had a legitimate basis for being in close proximity to the defendant, however, a frisk would nonetheless be lawful if the officers reasonably believed the defendant armed and dangerous. Although calling it a "close case," the Court found the frisk lawful considering all the circumstances.

F. Items Seized During The Search

G.L. c. 41, §98 states: "If an officer finds weapons or other things the possession of which may constitute a crime,

he may take it and keep it until completion of questioning, at which time he shall return it, if lawfully possessed, or he shall arrest such person."

The statute permits seizure of items unlawfully possessed (contraband) but does not provide for the seizure of evidence. However, upon finding items of evidentiary value, the officer may have probable cause to believe that a crime has been committed for which an arrest can be made. The evidence could then be lawfully seized incident to the arrest.

G.L. c. 41, §98 does not provide for the seizure of items requiring further investigation to determine whether they are contraband. Should a vial of pills be found during a stop, they must be returned if the officer does not have probable cause to believe they are possessed illegally. The officer may not seize the pills pending further investigation while allowing the suspect to go free. Of course, if the officer observes a substance which he has probable cause to believe is contraband, he may seize it. Sullivan v. District Court of Hampshire, 384 Mass. 736, 744 (1981).

Train1

THE LAW OF ARREST

I. INTRODUCTION

An arrest marks the initial stage of a criminal prosecution. An arrest must be supported by probable cause. See Beck v. Ohio, 379 U.S. 89, 91 (1964). Probable cause to arrest exists when the facts and circumstances known to the officer are sufficient to warrant a reasonably prudent person in believing that the suspect has committed or is committing a crime. Beck v. Ohio, 379 U.S. 89, 91 (1964); Commonwealth v. Franco, 419 Mass. 635, 639 (1995). The probable cause to arrest standard is distinguishable from the lesser "reasonable suspicion" standard which is necessary for an officer to conduct a threshold inquiry. See Terry v. Ohio, 392 U.S. 1, 25-27 (1968). Although a threshold inquiry is also a seizure within the meaning of the Fourth Amendment and Article 14, the rationale underlying the lesser standard is twofold. First, the duration of the detention is brief and second, a threshold inquiry does not serve to initiate a criminal prosecution but is merely a means to investigate suspicious circumstances. See id.

Finally, in addition to the constitutional requirement of probable cause, a police officer must have statutory or common law authorization in order to place someone under arrest. See Michigan v. DeFillippo, 443 U.S. 31, 36 (1976); Commonwealth v. Gullick, 386 Mass. 278, 282 (1982).

II. PROBABLE CAUSE TO ARREST

The Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights mandate that all arrests be supported by probable cause. Police have probable cause to arrest if the facts and circumstances within their knowledge are sufficient to warrant a reasonable person in believing that a person has committed or is committing an offense. Beck v. Ohio, 379 U.S. 89, 91 (1964); Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992); Commonwealth v. Stevens, 362 Mass. 24, 26 (1972); Commonwealth v. Gagne, 27 Mass. App. Ct. 425, 429 (1989). While the information upon which an officer relies in forming probable cause must be more than reasonable suspicion, it need not rise to the degree of certainty necessary for a criminal conviction. In short, the probable cause standard requires a reasonable ground for belief of guilt; this is a higher standard than the "reasonable suspicion" standard that applies to a threshold inquiry, but it is a lower standard than "proof beyond a reasonable doubt." See Commonwealth v. Bond, 375 Mass. 201, 210 (1978).

Probable cause to arrest must exist at the moment of arrest. Facts and circumstances which come to an officer's attention after a person has been taken into custody may not be used retroactively to justify the arrest. However, an officer need not make the arrest as soon as probable cause arises. Unlike probable cause to search, which is of limited duration, once probable cause to arrest is formed, it will continue to exist for an indefinite period, at least

if no intervening exculpatory facts come to light. As long as the defendant's speedy trial rights are not violated, a reasonable delay will not invalidate an arrest. See Commonwealth v. Jones, 360 Mass. 498, 501-502 (1971); Commonwealth v. Anderson, 9 Mass. App. Ct. 699, 704-706 (1980).

A. The Collective Knowledge Doctrine

In reviewing whether the police had probable cause to arrest, the court will apply the "collective knowledge doctrine" in appropriate situations. This doctrine recognizes that police investigations often involve the joint efforts of several officers, many of whom do not have access to all the facts, circumstances, and information. The doctrine holds that it is immaterial that the arresting officer lacks all the information creating probable cause to make the arrest, provided at least one investigating officer's knowledge satisfies the probable cause standard.

In Commonwealth v. Lanoue, 356 Mass. 337, 340 (1970), information provided to a police sergeant by a reliable and disinterested person served as the basis for the sergeant to have probable cause to arrest. The sergeant radioed a patrol officer, provided him with the defendant's description and directed him to be on the lookout for the defendant. When the patrol officer observed the defendant, he placed him under arrest. In upholding the legality of the arrest, the court stated that ". . . it is unnecessary for the detaining officer to know all of the information pertaining to the incident . . . the knowledge of one [police officer is] the knowledge of all." See also

Commonwealth v. Gullick, 386 Mass. 278, 283-284 (1982);
Commonwealth v. Zirpolo, 37 Mass. App. Ct. 307, 311 (1994);
Commonwealth v. Peters, 48 Mass. App. Ct. 15, 18 (1999).

However, there is an important exception to the collective knowledge doctrine. The police officer whose knowledge provides the basis for a finding of probable cause must be engaged in a cooperative effort with the arresting officer. Thus, in Commonwealth v. Hawkins, 361 Mass. 384, 386-387 (1974), the Court refused to apply the collective knowledge doctrine when the officers seized bonds found during a drug search of the defendant's apartment. The searching officers were not aware of a theft of bonds and were not working in cooperation with the officers who did have knowledge of the stolen bonds. Therefore, the collective knowledge doctrine did not supply probable cause to seize the bonds or to arrest the defendant.

B. Information Obtained Unlawfully

A police officer may not use information obtained in an unlawful manner to establish probable cause. In Commonwealth v. Haas, 373 Mass. 545, 551-552 (1977), the police detained and questioned the husband of a murder victim without first advising him of his Miranda rights. Because the statements were the sole basis for the defendant's arrest, the arrest was unlawful and the evidence seized as a result of the arrest was suppressed.

It should be noted that Massachusetts has not adopted the Federal "public safety" exception to the Miranda rule, permitting admission in the Federal Courts of statements made as a result of custodial interrogation in circumstances

where the absence of Miranda warnings is justified by a reasonable concern for public safety. See New York v. Quarles, 467 U.S. 649, 655-656 (1984). In Massachusetts, probable cause may not be based on information obtained in violation of the Miranda rule.

C. Sources Of Probable Cause

There are many sources of information which can give rise to probable cause to arrest. In general, whether probable cause exists depends on the totality of the facts and circumstances of each case as viewed through the eyes of a reasonable and cautious police officer. Wong Sun v. United States, 371 U.S. 471, 479 (1963). Officers are entitled to support their belief that a crime has been, is being, or is about to be committed from personal observations, first hand knowledge, and reliable information from other persons.

1. Personal Observations

A police officer's observations may furnish probable cause to arrest. See Commonwealth v. Avery, 365 Mass. 59, 63-64 (1974); Commonwealth v. Mitchell, 353 Mass. 426, 428-429 (1967). Clearly, where police observe criminal conduct, no further justification is needed to support an arrest. However, in many instances police observe conduct which under the circumstances is suspicious but not obviously unlawful.

In Commonwealth v. Alvarado, 420 Mass. 542, 545 (1995), an officer stopped a car occupied by two persons. When the officer approached the driver's side of the car, he saw the passenger stuffing what the officer thought was a

plastic bag, the contents of which could not be seen, down his pants. The court stated that this observation gave the officer reasonable suspicion to believe that the passenger had controlled substances in his possession. When the officer began to question the passenger, the passenger became exceedingly nervous, gave evasive and untrue answers, and repeatedly denied having placed anything in his pants. The court stated that the combination of all of these circumstances gave the officer probable cause to arrest the passenger and search his person incident to that arrest. Commonwealth v. Alvarado, 420 Mass. at 551. See also, Commonwealth v. Williams, 422 Mass. 111, 119 (1996); Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992); Commonwealth v. Sabetti, 411 Mass. 770, 776, (1992); cert. denied, 513 U.S. 916 (1994); Commonwealth v. Chavis, 41 Mass. App. Ct. 912, 914, (1996); Commonwealth v. Johnson, 32 Mass. App. Ct. 355, 358-359 (1992). But see Commonwealth v. Rivera, 27 Mass. App. Ct. 41, 43 (1989). Further, in Commonwealth v. Peters, 48 Mass. App. Ct. 15 (1999), the court found that the circumstances certainly warranted at least a threshold inquiry and may have even constituted probable cause to arrest the defendant. There, police saw the defendant enter a condominium complex known to police as a location for drug transactions. The defendant remained there for ten minutes, then drove a short distance away where he met a man who had pulled up to the defendant's car. The defendant engaged in what appeared to be a drug transaction. A trained narcotics officer, saw the man give

the defendant money and receive something in exchange. Peters, 48 Mass. App. Ct. at 17-18.

It is important to note that an officer's personal observations may form the basis of probable cause only if he is lawfully in the place from which the observations are made. For instance, an officer may not use any observations obtained as a result of a trespass to support the arrest of a person against whom the officer has trespassed. In Texas v. Gonzales, 388 F.2d 145, 147 (5th Cir. 1968), the police did not have probable cause to arrest or search, but nevertheless entered the defendant's property to look through a window into his home. Although the officers observed suspicious conduct, the information acquired from looking through the window could not serve as the basis for probable cause because the officers had committed a trespass. Cf. Commonwealth v. Thomas, 358 Mass. 771 (1971) (defendant had no standing to object to trespassory entrance by police into basement of defendant's apartment building, as landlord had exclusive use of area).

2. Prior Criminal Record Or Reputation

A person's past criminal history, by itself, may never constitute probable cause to arrest. See Beck v. Ohio, 379 U.S. 89, 97 (1964); Commonwealth v. Stevens, 362 Mass. 24, 28 (1974). However, it is one factor which may be considered by police in determining whether there is probable cause. For example, in Commonwealth v. Dottin, 353 Mass. 439, 441-442 (1968), the arresting officer, armed with information that several housebreaks had occurred in the area, approached the defendant who was sitting with a

television set in a taxi cab. When the defendant attempted to flee, the officer placed him under arrest. The Court upheld the arrest on the basis of the officer's direct observation of suspicious conduct and the fact that the officer had previously arrested the defendant for housebreaks.. See also Commonwealth v. Ortiz, 376 Mass. 349 (1978).

3. Flight Or Furtive Conduct

Flight or furtive conduct is often an innocent response to a confrontation with the police and, standing alone, it is usually not sufficient to establish probable cause. See Wong Sun v. United States, 371 U.S. 471, 484 (1963); Commonwealth v. Alvarado, 420 Mass. 542, 551 (1995); Commonwealth v. Wooden, 13 Mass. App. Ct. 417, 422 (1982). However, such conduct may be considered with other facts. "[D]eliberately furtive actions and flight . . . are strong indicia of mens rea [criminal mind], and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest." Peters v. New York, 392 U.S. 40, 66-67 (1968).

4. Evasive Answers, Refusal To Answer, Recanting Story

An officer may draw reasonable inferences from a suspect's answers and demeanor during questioning. While neither a refusal to answer nor an evasive answer is sufficient in and of itself to support an arrest, it may be an important factor in establishing probable cause when coupled with other information connecting the suspect to criminal activity. In Commonwealth v. Lawton, 348 Mass.

129, 131 (1964), while searching for a person involved in a housebreak, the police observed the defendant two blocks from where the suspect was last seen. Despite the ninety degree temperature, the defendant was dressed in a heavy jacket. When asked for his name, the defendant rebuffed the officer's questions with obscene and evasive replies. The Court held that the defendant's evasive attitude properly contributed to the police officer's probable cause to arrest. See also Commonwealth v. Cruz, 373 Mass. 676, 685 (1977) (officers were justified in considering the defendant's conflicting answers to their questions); Commonwealth v. Mulero, 38 Mass. App. Ct. 963, 965 (1995); Commonwealth v. George, 35 Mass. App. Ct. 551, 555 (1993) (1994).

5. Admissions And Confessions

A suspect's admission that he or she has knowledge of facts or evidence may be a factor contributing to probable cause. See United States v. Brown, 457 F.2d 731, 733 (1st Cir. 1972). Moreover, as a suspect's confession is an acknowledgment of criminal conduct, it is sufficient, standing alone, to establish probable cause to believe that a crime has been committed. See Commonwealth v. LaBossiere, 347 Mass. 384, 386 (1964).

6. Nature Of The Area

The nature of an area, i.e., whether it is residential, commercial, or prone to certain types of criminal activity, is another factor that the police may consider when determining if there is probable cause. Commonwealth v. Fraser, 410 Mass. 541, 545-547 (1991). See also Peters, 48

Mass. App. Ct. at 17-18 (condominium complex known to police as a location for drug transactions.) However, the nature of the area, in and of itself, is not enough to establish probable cause. Thus, the fact that an officer observed a man, whose identity was unknown, standing in a neighborhood frequented by drug users was not sufficient to establish probable cause to arrest him. Brown v. Texas, 443 U.S. 49, 52 (1979). On the other hand, in Commonwealth v. Ortiz, 376 Mass. 349, 354 (1978), the defendant was arrested after a month long surveillance of a public park known to be a drug trade area. That knowledge, coupled with observations of the defendant engaged in an apparent drug transaction, were important factors contributing to the probable cause to arrest.

7. Reliable Hearsay

Under certain circumstances, a police officer is entitled to use information provided by victims, witnesses, other police officers, and informants, to establish probable cause to arrest. Although hearsay evidence, i.e., out of court oral or written statements made by persons not under oath or subject to cross-examination, is usually inadmissible, hearsay may serve as the basis for probable cause if the credibility of the declarant or the inherent reliability of the content of the statements has been established. Draper v. United States, 358 U.S. 307, 311 (1959).

a. Hearsay From Victim

Generally, victims of crime, because they have no apparent motive to lie to the police, are presumed to be

credible providers of information. "An asserted victim . . . is a reliable informant even though his or her reliability has not been proven or tested". Nelson v. Moore, 470 F.2d 1192, 1197 (1st Cir. 1972). Therefore, in most instances, police may use the hearsay statements of crime victims to establish probable cause without first establishing the credibility of the person and the reliability of the statements. However, if a victim appears to have a motive for providing false information, police are advised to rely on the hearsay information only if it satisfies the two-prong Aguilar-Spinelli test, the same test the court applies in evaluating the reliability of an informant's statements. See United States v. Ventresca, 380 U.S. 102, 108-109 (1965).

b. Hearsay From Witnesses

An impartial witness to a crime, that is, an individual whose identity is known and not withheld, who is not paid to provide information, and whose statements appear to be based on personal observations or first hand knowledge, is presumed to be a reliable source of information. See Commonwealth v. Bowden, 379 Mass. 472, 476-477 (1980); Commonwealth v. Lee, 10 Mass. App. Ct. 518, 527 (1980). As with victims of crime, witnesses usually have no motive to lie to the police. Therefore, the hearsay statements of a witness, again assuming that there is no apparent reason for the witness to lie, may be the basis for probable cause to arrest.

c. Hearsay From Other Police Officers

Information provided from other police officers or law enforcement agents, whether personally or via radio communication, teletype, computer, etc., is generally considered reliable and may form the basis of probable cause to arrest. Whiteley v. Warden, 401 U.S. 560, 568 (1971); Commonwealth v. Antobendetto, 366 Mass. 51, 55 (1974). Therefore, a police officer may make an arrest when directed to do so by another police officer, or upon being advised that an outstanding warrant exists. However, the Commonwealth must be able to establish the underlying circumstances from which the officer providing the information reached his conclusions. Whitely v. Warden, 401 U.S. at 568; Antobendetto, supra at 56. Should a court later determine that the officer providing the information lacked probable cause or did not have a satisfactory basis for forming the conclusions upon which the arresting officer relied, the arrest may be held unlawful. See Antobendetto, supra at 55.

For example, in Whitely v. Warden, the defendant was arrested after the police received a radio communication that another agency held an arrest warrant in the defendant's name. However, because the Court later found that the warrant was not supported by probable cause, the arrest was unlawful. Id.

d. Hearsay From Informants

Hearsay statements from informants, i.e., persons who confidentially provide information to police, or provide information either for compensation or to escape

prosecution, are automatically suspect. Thus, unless an informant's statements satisfy the two-pronged, Aguilar-Spinelli test, the same test used to establish probable cause to search, they cannot serve as the basis for probable cause to arrest. Commonwealth v. Robinson, 403 Mass. 163, 164-165 (1988); Commonwealth v. Upton, 394 Mass. 363, 375 (1985). See Commonwealth v. Stevens, 362 Mass. 24, 27 (1972). Under the two-pronged test, an informant's information will establish probable cause only if the police can show the underlying circumstances on which the informant bases the information (the "basis of knowledge" prong), and somehow demonstrate that the information was credible or reliable (the "veracity" prong). The Massachusetts Supreme Judicial Court has held that independent police corroboration can compensate for deficiencies in either prong or both prongs of the Aguilar-Spinelli test. Commonwealth v. Robinson, 403 Mass. 163, 166 (1988); Commonwealth v. Olivares, 30 Mass. App. Ct. 596, 598-599 (1991).¹

1) Basis Of Knowledge Prong

An officer must be able to establish the basis of the informant's information. Mere conclusory allegations such as "has knowledge that drugs are being sold" or "knows that stolen items are stored in the building" must be avoided.

¹ Federal courts employ the "totality of the circumstances" test enunciated in Illinois v. Gates, 462 U.S. 213, 230 (1983), when determining whether an informant's statements establish probable cause to arrest. Commonwealth v. Robinson, 403 Mass. 163, 164-166 (1988); Commonwealth v. Upton, 394 Mass. 363, 369-377 (1985).

Rather, an officer must determine and reveal how the informant gained this knowledge. For example, did the informant see or otherwise personally perceive the facts asserted? Did the informant jointly participate with the suspect in the criminal offense? Or did the informant merely hear of the activity secondhand?

In Commonwealth v. Bottari, 395 Mass. 777, 778 (1985), an informant provided the police with a tip that the defendant had a "big gun" for which he had no license. The informant also described the car the defendant was driving and where he could be found. Based on the information given to them, the police located the car. Upon the defendant's return, they blocked the car with their cruiser and ordered the defendant out of the car at gun point. Although a .44 magnum was subsequently discovered in the trunk, the Court ruled the arrest was illegal, reasoning that the basis of knowledge prong of the Aguilar-Spinelli test was not satisfied. There was no showing of any underlying facts on which the informant based his information that the defendant had a large gun. Bottari, 395 Mass. at 783-784.

While first hand knowledge is clearly more reliable, a tip which does not indicate that the informant actually saw or perceived the information may still establish probable cause if it contains enough detail to establish that the informant is not merely passing on a casual rumor. Draper v. United States, 358 U.S. 307, 311 (1959). For example, in Commonwealth v. Grzembowski, 393 Mass. 516, 522 (1988), police arrested the defendant based on information provided by an informant who did not have first hand knowledge. Because

the informant was an identified citizen living at a known address who learned about the criminal activity from his step-brother, an apparent participant in the crime, the Court concluded that the informant's statement, although hearsay, constituted a sufficiently reliable source of information.

2) Veracity Prong

Under the veracity prong, the police must demonstrate that the information is credible or reliable. See, e.g., Commonwealth v. Hason, 387 Mass. 169 (1982). Instead of simply stating that "the informant is reliable", the officer should state that the informant has provided information in the past which has resulted in convictions, arrests, or confessions, and should provide as much detail as possible about the previous cases. Commonwealth v. Avery, 365 Mass. 59, 62-65 (1974); Commonwealth v. Ramon, 31 Mass. App. Ct. 963, 964 (1992); Commonwealth v. Ferrara, 10 Mass. App. Ct. 818, 819 (1980). See, e.g., Commonwealth v. Hason, 387 Mass. 169 (1982).

Where an informant admits to participating in criminal activity with the suspected person, the hearsay statements, being contrary to the informant's penal interests, carry their own indicia of credibility. United States v. Harris, 403 U.S. 573, 583 (1971); Commonwealth v. Norris, 6 Mass. App. Ct. 761, 765 (1978). But see Commonwealth v. Melendez, 407 Mass. 53, 56 (1990) (in order for a statement to be considered against penal interest, there must be information which tends to show that the informant would have had a reasonable fear of prosecution at the time the statement was

made). An admission against penal interest, however, is not conclusive on the issue of reliability, but is merely a factor tending to show reliability. Commonwealth v. Spano, 414 Mass. 178, 186 (1993); Commonwealth v. Parapar, 404 Mass. 319, 322 (1989); Commonwealth v. Benlien, 27 Mass. App. Ct. 834, 837-838 n.4 (1989).

3) Corroboration

Corroboration of the information may compensate for deficiencies in either the basis of knowledge or veracity prongs. For example, where surveillance corroborates more than just innocent and readily available details, but shows, for instance, that the suspect identified by the informant is a known narcotics user and dealer, that his movements, vehicle, residence, and description are consistent with the informant's description, and that the customers identified by the informant are also known narcotics dealers, the Supreme Judicial Court has held that the informer's reliability is established. Commonwealth v. Carrasco, 405 Mass. 316, 321-322 (1989). See also Commonwealth v. Spano, 414 Mass. 178, 185 (1993).

Corroboration may also establish the "basis of knowledge" of a tip from a reliable informant. Where the reliable informant tells the police only that a particularly described man will arrive at a bus station at a particular time carrying drugs, without any information as to how the informant learned these facts, it is sufficient corroboration when the defendant, fitting the description provided, arrives at the bus station at the stated time. Commonwealth v. Robinson, 403 Mass. 163, 166 (1988);

Commonwealth v. Santana, 403 Mass. 167, 171 (1988);
Commonwealth v. Gonzalez, 403 Mass. 172, 178 (1988);
Commonwealth v. Fleming, 37 Mass. App. Ct. 927, 928 (1994).
 The description of the suspect must, however, be sufficiently detailed. Commonwealth v. Spence, 403 Mass. 179, 181 (1988) (race alone insufficient despite detailed description of defendant's companion); Commonwealth v. Ramon, 31 Mass. App. Ct. 963, 964 (1992). See also Commonwealth v. Hall, 366 Mass. 790, 798 (1975).

It should be emphasized that superficial details easily available to any passerby cannot provide sufficient corroboration of an otherwise unreliable tip. See Commonwealth v. Gisleson, 6 Mass. App. Ct. 911, 912 (1978) (police observation of car similar to that described by an informant outside the suspect's home not sufficient to establish reliability).

Where a reliable person's information is insufficient to establish probable cause, as for instance where a suspect matches a victim's description but is wearing different clothing from that described, corroboration may be found in other factors known to the police, such as the time of the stop, the location of the defendant when stopped, and the direction he was headed in relation to the scene of the crime. Commonwealth v. Carrington, 20 Mass. App. Ct. 525, 528-529 (1985). See also Commonwealth v. Gagne, 27 Mass. App. Ct. 425, 429 (1989) (probable cause existed to arrest defendant where he matched victim's description and was seen walking away from area of crime, despite victim's inability to identify defendant's photograph). In some instances, the

information gained by police while attempting to corroborate a tip may be sufficient to establish probable cause without reference to the original, and perhaps unreliable, tip.

III. ELEMENTS OF ARREST

A court's determination of the moment at which an arrest occurs is often crucial to a criminal prosecution. It is at the moment of arrest that an officer must have probable cause to believe that a criminal act has occurred. The moment of arrest also triggers certain rights, such as the statutory right to use a telephone G.L. c. 276, §33A, as well as the constitutional right to Miranda warnings. Miranda v. Arizona, 384 U.S. 436 (1966). Should a court conclude that an arrest took place before probable cause existed, or that an arrestee's incriminating statements were made prior to being given the Miranda warnings, any evidence obtained subsequent to the arrest may not be admissible in court.

A court's determination of the moment at which an arrest takes place is based on an objective standard and does not depend upon the subjective belief of the officer or the arrestee. Commonwealth v. Cook, 419 Mass. 192, 198-199 (1994); Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992); Commonwealth v. Hason, 387 Mass. 169, 175 (1982). Commonwealth v. Gullick, 386 Mass. 278, 283 (1982). The Fourth Amendment requires that an arrest has not occurred until a suspect submits either to an assertion of authority or to physical force. California v. Hodari D., 499 U.S. 621, 626 (1991). Article 14 of the Massachusetts Declaration of Rights requires that an arrest occurs when a

reasonable person, faced with the same facts and circumstances, would believe that he was not free to disregard the police and to leave the area. Commonwealth v. Cook, 419, Mass. 192, 198-199 (1994). Three factors are often considered in analyzing whether an arrest has occurred.

- A. Whether the police officer's purpose or intention was to arrest the individual;
- B. Whether the individual was aware of the police officer's purpose or intention; and
- C. Whether a reasonable person would have believed he was not free to leave.

A. Purpose And Intention To Arrest

A police officer's intention is one factor that the court considers in determining when and if an arrest occurred. Commonwealth v. Cook, 419 Mass. 192, 198 (1994). If contradicted by overt acts, however, the officer's undisclosed beliefs are likely to be completely disregarded by a court. For example, in Commonwealth v. Ballou, 350 Mass. 751, 756 (1966), a police officer testified that he believed the defendant to be in his custody at a certain moment. Nevertheless, the Court concluded that an arrest had not taken place at that moment because the officer had neither communicated his intentions to the defendant nor actually or constructively limited the defendant's freedom.

B. Communication Of Intent To Arrest

For an arrest to be complete, the officer must somehow communicate to the arrestee that he intends to restrict the arrestee's liberty. However, the officer need not use formal words of arrest. Commonwealth v. Sanderson, 398 Mass. 761, 766 (1986); Commonwealth v. Holmes, 344 Mass.

524, 525 (1962). Rather, the officer's language or tone of voice may indicate to the arrestee that he is in police custody, as may the officer's non-verbal acts such as showing a weapon, surrounding the arrestee, or using physical contact. See United States v. Mendenhall, 446 U.S. 544, 554 (1980). Thus, when officers positioned their cruisers to completely block the defendant's car and detained him for forty minutes, the Massachusetts Supreme Judicial Court in Commonwealth v. Sanderson, 398 Mass. 761, 766-767 (1986), ruled that the officers had effectuated an arrest despite their subjective intent to stop the defendant to conduct a threshold inquiry.

C. Physical Detention

Despite communicating an intention to take someone into custody, a police officer has not made an arrest until the arrestee has been actually or constructively detained. See Commonwealth v. Haas, 373 Mass. 545, 552 (1977); Commonwealth v. Cruz, 373 Mass. 676, 683-684 (1977). The Supreme Judicial Court articulated the standard as whether, "in view of all the surrounding circumstances, a reasonable person would have believed that he was not free to leave." Commonwealth v. Thinh Van Cao, 419 Mass. 383, 387 (1995). See Commonwealth v. Parker, 402 Mass. 333, 339 (1988) (although police executed a search warrant of the defendants' home pursuant to a murder investigation and the defendants accompanied the officers to the stationhouse for questioning and were read their Miranda rights, no reasonable person would conclude that they were forcibly detained). See also Commonwealth v. Corriveau, 396 Mass.

319, 325 (1985) (where court determined that no arrest had occurred when the defendant voluntarily accompanied the police to the stationhouse to answer questions).

IV. WARRANT ARRESTS

An arrest warrant is an order, made in writing, issued by a judge or other competent authority in the name of the Commonwealth, commanding that a specific individual be arrested and brought before a court. Cf. Commonwealth v. Conlin, 184 Mass. 195, 197 (1903). The Fourth Amendment to the United States Constitution and Article 14 of the Massachusetts Declaration of Rights require that a warrant issue only upon a showing of probable cause to believe that a crime has been or is being committed and that the individual named in the warrant is the likely offender.

A. Preference Accorded To Warrants

With the exception of dwelling arrests, police are not required to obtain a warrant prior to making an arrest. The proper constitutional test for the validity of an arrest is simply whether probable cause exists at the moment of the arrest, not whether a warrant had been, or could have been obtained. United States v. Watson, 423 U.S. 411, 417-424 (1976). Although a warrant is not a prerequisite to a valid arrest in a public place, there is a clear judicial preference for arrests made after an "objective predetermination of probable cause" by an impartial judicial officer. Beck v. Ohio, 379 U.S. 89, 96 (1964). In fact, where the facts and circumstances indicate that probable cause may have been lacking at the moment of arrest, a court is more likely to uphold the validity of the arrest if it

was made pursuant to a warrant. As stated by the United States Supreme Court, "Law enforcement officers may find it wise to seek arrest warrants where practicable to do so, and their judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate." United States v. Watson, 423 U.S. at 423. The right to conduct warrantless arrests in a public place extends to situations in which a person retreats into a dwelling in order to elude the police. While in "hot pursuit" of a suspect, an officer may follow a suspect into a dwelling for the purpose of making an arrest. United States v. Santana, 427 U.S. 38, 42-43 (1976).

B. Dwelling Arrests

Because of the great expectation of privacy that is associated with dwellings, in the absence of exigent circumstances, a warrantless entry into a home to effect an arrest is a violation of the Fourth Amendment. See Payton v. New York, 445 U.S. 573, 576 (1980); Commonwealth v. Forde, 367 Mass. 798, 804-807 (1975); Commonwealth v. Midi, 46 Mass. App. Ct. 591, 593-594 (1999). Therefore, the police must apply for, and receive, an arrest warrant prior to making a misdemeanor or felony arrest in a dwelling. However, the common areas and hallways of a large multi-unit dwelling, where not controlled by a small number of residents, are afforded no more protection than public areas. See Commonwealth v. Boswell, 374 Mass. 263, 269 (1978) (where common area "is open so that anyone can enter it," no reasonable expectation of privacy exists). But see Commonwealth v. Hall, 366 Mass. 790, 794-795 n.5 (1975)

(locked hallway in three-unit building leading only to landlord's apartment and vacant apartment was exclusively controlled by landlord, who had reasonable expectation of privacy there).

Once in possession of a valid arrest warrant, the Fourth Amendment to the United States Constitution permits police to enter a suspect's dwelling if they have "reason to believe" the suspect is there. Payton v. New York, 445 U.S. 573, 603 (1980). Massachusetts appellate courts have not yet decided whether Article 14 of the Massachusetts Declaration of Rights requires a higher standard than "reason to believe," such as probable cause to believe the suspect is home. See Commonwealth v. DiBenedetto, 427 Mass. 414, 418-419 (1998).

1. Exigent Circumstances

Where the constitutional requirement of probable cause is satisfied, the presence of exigent circumstances validates a warrantless entry into a dwelling for the purpose of arresting a suspect. Such an exigency exists where circumstances at the time of entry would lead a reasonable person to believe that a suspect may escape, destroy evidence, continue the commission of an on-going crime, or harm other persons. See United States v. Santana, 427 U.S. 38, 42-43 (1976). In Commonwealth v. Forde, 367 Mass. 798, 807 (1975), the court identified five factors which may contribute to a finding of exigent circumstances:

- a. The crime was one of violence and the suspect is believed to be armed and dangerous;
- b. There is probable cause to believe that a felony has been committed and that the suspect is in the dwelling;
- c. There is a likelihood that the delay necessitated by seeking a warrant would result in the destruction of evidence or property;
- d. There is a likelihood that the suspect will escape if not immediately apprehended; and
- e. There is a reasonable basis for believing that the delay necessitated by seeking a warrant would subject the officers or others to physical harm.

. See Commonwealth v. Midi, 46 Mass. App. Ct. 591, 594 (1999). In Commonwealth v. Forde, 367 Mass. at 807, a warrantless arrest was invalidated where police should have foreseen the development of exigent circumstances and had an opportunity to obtain a warrant. In Commonwealth v. Bradshaw, 385 Mass. 244, 253 (1982), however, the Court found that exigent circumstances existed and that it would have been impracticable for the police to delay a dwelling arrest in order to obtain a warrant. The police had probable cause to believe that the defendant had committed a murder. Several officers immediately proceeded to the defendant's home, and believing him to be armed, dangerous, and in the company of other persons, set off a fire alarm, causing the defendant to go out onto the landing at the top of the exterior stairs leading to his apartment, where he was arrested. Without deciding whether the ruse implicated the defendant's privacy interests, the Court concluded that,

even analyzed as a warrantless arrest in the defendant's home, the arrest was justified by exigent circumstances. Although the police could have staked out the apartment while they sought a warrant, if the defendant had attempted to flee or noticed the police during the stake-out, the risk of violence would have been greatly increased. Thus, unlike the situation in Forde, the police in Bradshaw were unable to foresee the development of the exigent situation in which they were involved and did not delay the arrest for a significant period of time during which they could have obtained a warrant.

Similarly, in Commonwealth v. Curcio, 26 Mass. App. Ct. 738, 745-746 (1989), the Appeals Court upheld a warrantless search and arrest in the defendant's home when the defendant unexpectedly announced that the cocaine deal he had negotiated with an undercover officer would have to be consummated within a short time and in his home. Danger to the undercover officer and possible destruction of evidence would have resulted from a delay, as the suspects were armed and would suspect police involvement. There was accordingly no time to seek a warrant, and the exigency of the situation justified the backup officers' warrantless entry into the defendant's home. Further, in Commonwealth v. Martinez, 47 Mass. App. Ct. 839 (1999), there was probable cause plus exigent circumstances justifying entry and arrests at a motel room. There, the police were not in a position to obtain a search warrant in advance, and once the narcotics sale was completed, the participants would quickly disperse.

Also, the police were indeed "bound" to arrest or else the undercover officer would be in "deadly peril". Id. at 843.

2. Arrests In Dwellings Of Third Persons

In Steagald v. United States, 451 U.S. 204, 212-213 (1981), the Supreme Court held that, where police wish to arrest a person believed to be in the dwelling of a third party, absent exigent circumstances, both an arrest warrant and a search warrant must be obtained. The Court reasoned that a valid arrest warrant serves only to eliminate any legitimate expectation of privacy as to the person charged with a crime. Because a third party in control of a dwelling has a privacy interest independent of that of the suspect, the police must obtain a search warrant based upon probable cause to believe that the suspect is located in the third party's dwelling. Where the police have an arrest warrant but no search warrant to enter a third party's dwelling, only the third party has standing to contest the lack of a search warrant. Commonwealth v. Allen, 28 Mass. App. Ct. 589, 592 (1990).

C. Issuance Of Arrest Warrant

1. Application Process

Application for an arrest warrant must be made to a person authorized to receive criminal complaints, namely, justices of the Supreme Judicial Court, Superior Court or District Court, and clerks or assistant clerks. See G.L. c. 218, §33; G.L. c. 276, §21. In any event, the issuing authority must be a neutral and detached party, capable of objectively determining whether probable cause exists. Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972). In

order to obtain an arrest warrant, officers are not required to submit an affidavit setting out the facts and circumstances of the case. However, an arrest warrant will not issue until the officer's complaint has been reduced to writing and the issuing authority is satisfied that there is probable cause to believe that the individual named in the warrant has committed a crime. See G.L. c. 276, §22; Mass. R. Crim. P. 6(a)(2).

2. Summons

The Massachusetts legislature has expressed a clear intention to have persons brought before a court by means of a summons rather than an arrest warrant. Therefore, a summons must issue in lieu of a warrant unless, in the judgment of the issuing authority, there is reason to believe that the defendant will not appear if summonsed. See G.L. c. 276, §24; Mass. R. Crim. P. 6(a)(1). If the defendant is under twelve years of age, the court must issue a summons unless the child is already in default. G.L. c. 119, §54.

3. Form Of Warrant

An arrest warrant must contain either the name or a sufficient description of the person to be arrested. While the name alone is normally sufficient, police are advised to include other identifying information in the warrant, such as the person's residence or business address, physical description, etc. If the name of the suspect is not known, "any name or description by which [the suspect] can be identified with reasonable certainty" will suffice. Mass. R. Crim. P. 6(b)(1). Merely describing the individual as

"John Doe" is impermissibly vague. Commonwealth v. Crotty, 92 Mass. (10 Allen) 403, 404-405 (1865). Rather, information such as the person's occupation, physical appearance, peculiarities, and place of residence should be included. Id. at 405. In Commonwealth v. Baldassini, 357 Mass. 670, 674 (1970), the Court upheld a "John Doe" warrant which described the defendant as: "John Doe, also known as 'Baldi' and Baldassini, a white male between 50 and 55 yrs. of age, 5'8", 170-180 pounds, and dark hair, of said Quincy."

The warrant must also recite the substance of the offense. Mass. R. Crim. P. 6(b)(1). This requirement does not mean that the warrant must recite the facts of the case. The warrant need only state the criminal charge, i.e., "assault and battery" or "larceny."

D. Execution Of The Warrant

Any person authorized to serve criminal process in any county may be directed to take an individual into custody on the basis of an arrest warrant. See G.L. c. 276, §23; G.L. c. 218, §37; Mass. R. Crim. P. 6(c)(1). Among those so authorized are the chief of police and police officers of cities and towns, G.L. c. 41, §98, state police officers, G.L. c. 147, §2, constables, G.L. c. 41, §94, and sheriffs and their deputies, G.L. c. 37, §11. Court officers and probation officers may serve arrest warrants issued by their court. G.L. c. 218, §37.

A valid arrest warrant may be executed at any place within the Commonwealth without regard to the county in which it was issued. See G.L. c. 276, §23; G.L. c. 218,

§37; Mass. R. Crim. P. 6(c)(3). Therefore, a police officer has the authority to move beyond his jurisdictional boundaries to any place within the state in order to apprehend a person named in an arrest warrant.

An arrest warrant is executed upon the arrest of the person named in the document. A police officer need not have physical possession of the warrant at the moment of arrest. Commonwealth v. Walker, 370 Mass. 548, 560, cert. denied, 429 U.S. 943 (1976). However, upon the arrestee's request, the warrant must be presented for inspection at the earliest possible time. Mass. R. Crim. P. 6(c)(3). When the officer does not have the warrant in hand, the arrestee must be informed of the issuance of the warrant and the nature of the offense charged. If the offense is not known to the officer, the arrestee must be informed of the charge within a reasonable time after the arrest. Mass. R. Crim. P. 6(c)(3). If a police officer pretends to have a warrant when in fact none exists, the officer may be subjected to a fine of up to \$1000 or one year imprisonment. G.L. c. 263, §2.

1. The Knock And Announce Rule

The common law "knock and announce" rule prohibits a police officer, except under limited circumstances, from making an unannounced entry into a dwelling to execute a warrant. Commonwealth v. Cundruff, 382 Mass. 137, 140-148 (1980), cert. denied, 451 U.S. 973 (1981). Therefore, in most instances, officers must announce their identity and purpose and wait a reasonable amount of time to be admitted before entering a dwelling. Failure to comply with the rule

will result in suppression of any evidence found during execution of the warrant. Commonwealth v. Manni, 398 Mass. 741, 743 (1986).

There are exceptions to the "knock and announce" rule, but they are applied strictly and narrowly. To enter a premises without knocking and announcing, the police must have probable cause to believe that evidence will be destroyed or the suspect will escape, or the police must be able to show facts indicating there is a strong possibility that knocking and announcing will result in violent resistance threatening the safety of the officers, the persons on the premises, or the public. See Commonwealth v. Allen, 28 Mass. App. Ct. 589, 594-595 (1990). See also Commonwealth v. Rodriguez, 415 Mass. 447, 450 (1993). These factors must exist at the time of the execution of the warrant. See Commonwealth v. Scalise, 387 Mass. 413, 421 (1982).

Unlike search warrant forms, the typical arrest warrant form does not contain a "box" which the issuing clerk may check to authorize the police to make a "no-knock" entry of the premises. In cases where the police seek to enter the defendant's residence by force, it would nevertheless be wise to present the reasons for a "no-knock" entry to the issuing clerk and have the clerk expressly write on the arrest warrant, "This warrant may be executed without knocking and announcing" or "No-Knock Warrant." Failure to seek prior authorization for a "no-knock" entry has been held to require suppression even where there was sufficient justification to enter forcibly. Commonwealth v. Manni, 398

Mass. at 743. See Commonwealth v. Benlien, 27 Mass. App. Ct. 834, 835 (1989). The clerk has authority to authorize a "no-knock" warrant in this manner regardless of the absence of a box to check on the warrant form. Commonwealth v. Scalise, 387 Mass. at 416.

Where exigent circumstances are present that would permit forcible entry, the police may deceive a suspect into voluntarily opening a door or otherwise gain entrance to a dwelling by using a ruse. In Commonwealth v. Cundriff, 382 Mass. 137, 139 (1980) the police went to the defendant's home to arrest him on an armed robbery warrant. The police knocked on the door and called out "School bus" after a woman inside asked, "Who is it?" The entry was determined to be lawful because the Court found that announcement by the police of their identity and purpose would have endangered themselves or others. See also Ponce v. Craven, 409 F.2d 621, 626 (9th Cir. 1969), (the Constitution only prohibits police from obtaining entry through subterfuge to a place where they have no right to be).

2. Time Of Service

Unlike probable cause to search, which is of limited duration, once probable cause to arrest is formed, it continues to exist for an indefinite period provided no intervening exculpatory fact comes to light. Thus, once an arrest warrant is issued, it remains valid until executed or recalled by the court.

However, G.L. c. 268, §32, provides that warrants must be served without "unreasonable delay". While "unreasonable delay" has not been specifically defined by the courts, the

term seems to require only that the police exercise diligence "so far as possible" in serving an arrest warrant when it is issued. At least where the initial unsuccessful efforts to serve a warrant are documented, an arrest made years after the warrant was issued is likely to be upheld. See Commonwealth v. Jones, 360 Mass. 498, 501-502 (1971) (arrest two years after issuance of warrant); Commonwealth v. Anderson, 9 Mass. App. Ct. 699, 704-705 (1980) (arrest six years after issuance of warrant).

Massachusetts law provides for criminal penalties of up to a \$50 fine if a police officer willfully delays service of a warrant, G.L. c. 268, §22, or of up to \$500 fine or one year imprisonment if an officer willfully and corruptly delays or refuses to serve a warrant resulting in the escape of the defendant, G.L. c. 268, §23.

3. Using Warrant To Arrest On Suspicion Of Other Criminal Conduct

Provided that the police act in good faith, they may execute an outstanding warrant in order to take a person into custody who is suspected of other criminal acts for which probable cause is lacking. In Commonwealth v. Sullivan, 354 Mass. 598, 609 (1968) the police suspected the defendant of armed robbery, but lacked probable cause to arrest. An officer arrested the defendant on a valid outstanding warrant for unrelated charges. The court upheld the arrest and noted that the police had procured the warrant before the robbery and had not unreasonably delayed its execution. See also Commonwealth v. Clermy, 421 Mass. 325, 327 (1996) (seizure of drugs contained in small plastic

bottle found on defendant subsequent to his arrest on outstanding motor vehicle default warrant was valid).

On the other hand, if it appears that the warrant was procured or its service was delayed as a pretext to conduct a search, an arrest made pursuant to the warrant will be invalid and any evidence seized will be unlawful. In Taglavore v. United States, 291 F.2d 262, 264 (9th Cir. 1961), police officers obtained an arrest warrant charging the defendant with two minor traffic violations. The police then delayed service of the warrant until they thought the defendant would be carrying illegal drugs. The court struck down the arrest and subsequent search, stating that there had been ". . . a deliberate scheme to evade the requirements of the Fourth Amendment by using a traffic arrest warrant to search for narcotics."

4. Invalid Warrant

In cases where an invalid or void warrant is the basis of an arrest and incriminating evidence is discovered as a result, the decision to admit or exclude the evidence at trial depends on whether the police acted in good faith and reasonably. In Commonwealth v. Hecox, 35 Mass. App. Ct. 277, 279 (1993), police officers stopped the defendant solely because they believed that a warrant was outstanding for his arrest, and found cocaine in plain view as a result of the detainment. In ruling that the cocaine was properly suppressed, the Appeals Court noted that five days before the defendant's arrest, the warrant had been rescinded. With an eye toward establishing an incentive for maintaining efficient police records, the court held that where there is

stale information or outmoded records that are demonstrably incorrect, the Commonwealth has the burden of showing that it is not at fault in failing to update its records.

Finally, it is important to note that even if probable cause to justify issuance of the warrant is lacking, an arrest may still be valid as a warrantless arrest if the police gain sufficient knowledge after the issuance of the warrant, but prior to the arrest, to establish probable cause. See Commonwealth v. Fielding, 371 Mass. 97, 102-103, 114-115 (1976); Commonwealth v. Tisserand, 5 Mass. App. Ct. 383, 385-386 (1977).

5. Pat Frisk of Arrestee's Companion

When police execute a valid arrest warrant, they are not automatically authorized to pat-frisk the arrestee's companion(s) for weapons. Commonwealth v. Wing Ng, 420 Mass. 236, 237-238 (1995). Instead, police may only pat-frisk a companion if the requirements of Terry are met, i.e., there must be specific and articulable facts that would support a reasonable conclusion that the companion might be armed and dangerous. Id. at 240. See "The Law of Threshold Inquiry", Part V "The Frisk for Weapons", supra. In Wing Ng, an arrest warrant was issued for the arrest of the defendant's brother in connection with a recent home invasion committed by four Asian males. When police converged upon the defendant's brother in his car, the defendant was also in the car. The arresting officers pat-frisked the defendant and found a gun on his person. While the court acknowledged that the case presented a close question, it concluded that the pat-frisk of the defendant

was justified based on the information and circumstances known to the officers at the time of the pat-frisk: the defendant was the brother of the person named in the arrest warrant, he was with the arrestee one week after the home invasion, he had recently been in two restaurants with the arrestee, the crime for which the arrestee was wanted was a violent felony, and the perpetrators of the crime had been armed and had stolen a weapon. The court also pointed to the fact that the identities of the arrestee's co-felons were unknown and that the arrest took place on a public street in Boston. Commonwealth v. Wing Ng, 420 Mass. at 240-241. These facts permitted the reasonable inference that the defendant might have been one of the perpetrators of the crime and that he might still be armed. Id. at 241. See also Commonwealth v. Calderon, 43 Mass. App. Ct. 228, 230-231 (1997) (upholding stop and frisk of arrestee's companion).

V. WARRANTLESS ARRESTS

As mentioned above, the police are under no obligation to seek a warrant prior to making an arrest in a public place. Most arrests, in fact, are made without a warrant. The lawfulness of a warrantless arrest turns on the existence of probable cause and compliance with state law.

General Laws c. 218, §34 sets forth a condition for warrantless arrests: " . . . the officer [must] endorse upon the complaint a statement of his doings." Compliance with the statute requires only that the police officer state the time, date, manner, and place of arrest on the criminal complaint which is filed subsequent to a warrantless arrest.

However, failure to comply with the statute does not necessarily jeopardize the prosecution. In Commonwealth v. Gorman, 288 Mass. 294, 301 (1934), the Court stated that "The return which should be endorsed upon the complaint . . . is not essential to the validity of the complaint."

A. Felony Arrests

A police officer may arrest, without a warrant, a person whom the officer has probable cause to believe has committed, is committing, or is about to commit a felony. See Commonwealth v. Frazier, 410 Mass. 235, 241 (1991); Commonwealth v. Hason, 387 Mass. 169, 174 (1982); Commonwealth v. Holmes, 344 Mass. 524, 525 (1962). A felony is any "crime punishable by death or imprisonment in the state prison." G.L. c. 274, §1.

B. Misdemeanor Arrests

Unless otherwise authorized by statute, a police officer may not make a warrantless arrest for a misdemeanor unless the offense (1) is committed in the officer's presence, (2) involves a breach of the peace, and (3) is continuing at the time of arrest, or is only interrupted, so that the offense and the arrest form part of the same transaction. Commonwealth v. Howe, 405 Mass. 332, 334 (1989); Commonwealth v. Gorman, 288 Mass. at 297; Commonwealth v. Conway, 2 Mass. App. Ct. 547, 550 (1974). For example, in Commonwealth v. Conway, 2 Mass. App. Ct. 547, 550 (1974), the arrest of the defendant on charges of unauthorized use of a motor vehicle was unlawful. The police arrived at the scene of the arrest fifteen minutes after the vehicle had

last been in use and the officers did not observe the defendant in the vehicle.

A breach of the peace is a "violation of public order or decorum which disturbs the public peace and tranquillity; or any act of disorderly conduct which disrupts the public peace." 11 C.J.S. 1 (1938). The breach which justifies a warrantless misdemeanor arrest may be prospective or anticipated. "An officer, who sees a person committing a misdemeanor of such a sort that a breach of the peace is likely to follow unless the offender be restrained, need not delay an arrest until the harm has been done." Commonwealth v. Gorman, 288 Mass. at 298. An affray or assault amounts to a breach of the peace as does a high speed motor vehicle chase through city streets.

C. Mandatory Warrantless Arrests For Domestic Abuse

While police officers generally have discretion concerning whether or not to make an arrest, the Legislature has mandated that police officers shall make a warrantless arrest of anyone whom an officer has probable cause to believe has violated a court order issued to prevent domestic abuse. Mass. G.L. c. 209A, §6 instructs police officers as follows:

1. An officer shall arrest any person he witnesses or has probable cause to believe has violated a temporary or permanent vacate, restraining, or no-contact order, or a judgment issued by any court pursuant to the domestic violence abuse prevention act or during divorce, custody, or support proceedings. This includes failure or refusal to

comply with orders for suspension and surrender of firearms, ammunition, licenses for same, FID cards possessed, owned or controlled by the defendant. G.L. c. 209A, § 3B. The power to make warrantless arrests where an officer witnesses or has probable cause to believe any person has violated a temporary or permanent restraining order under G.L. c. 209A, § 6(7) now also extends to similar protection orders issued by another jurisdiction. G.L. c. 276, § 28.

2. Where no such order is in effect, arrest shall be the preferred response whenever an officer witnesses or has probable cause to believe that a person has committed (a) a felony; (b) a misdemeanor involving abuse; or (c) an assault and battery. The statute notes that "[t]he safety of the victim and any involved children shall be paramount in any decision to arrest."

Thus, police officers must arrest if probable cause exists to believe that a domestic abuse restraining order has been violated, and are urged to arrest where probable cause exists to believe that domestic abuse has occurred and that the victim and any children are at risk for their safety. That a victim does not want the abuser arrested is not a relevant consideration. Factors contributing to probable cause to arrest include, but are not limited to, a victim's visible bruises or other physical injuries, obvious fear, statements (even if she tries to retract them); disheveled clothing or furniture, or other evidence of a struggle; and reports of other witnesses.

D. Other Statutory Authorizations for Warrantless Arrests

Numerous statutes permit but do not require police officers to make warrantless arrests in situations that might not otherwise satisfy the common law requirements for a misdemeanor arrest. These include:

G.L. c. 33, §61 (police may make warrantless arrest of members of armed forces absent without leave).

G.L. c. 40, §32B (police may make warrantless arrest of person who intentionally violates a curfew).

G.L. c. 90, §18A (police may make warrantless arrest of a pedestrian who has violated a traffic rule and refused to give his name and address in response to a request to do so by the police).

G.L. c. 90, §21 (officer may make warrantless arrest for driving without a license; uniformed officer may make warrantless arrest for driving after suspension, driving under the influence of alcohol or drugs, use of a motor vehicle without authority, failure to stop for a police officer, or leaving the scene of an accident).

G.L. c. 90B, §13 (authorized officers may make warrantless arrest of person violating motorboat rules and regulations).

G.L. c. 94C, §41 (re: warrantless arrests for drug offenses).

G.L. c. 120, §12 (police may make warrantless arrest of child who has escaped from the department of youth services).

G.L. c. 130, §99 (shellfish constable may make warrantless arrest of a person engaged in unlawful shellfishing).

G.L. c. 147, §8A (county police may make warrantless arrest for idle and disorderly conduct).

G.L. c. 167B, §21 (police may make warrantless arrest of person discovered in violation of electronic banking laws).

G.L. c. 266, §30A (police may make warrantless arrest of shoplifter).

G.L. c. 266, §37C (police may make warrantless arrest of person discovered engaging in credit card fraud).

G.L. c. 266, §102B (police may make warrantless arrest of person who makes, uses, or possesses a molotov cocktail).

G.L. c. 270, §16 (police may make warrantless arrest of person whose name is unknown to police for spitting in public place).

G.L. c. 270, §18 (police may make warrantless arrest of person who intentionally inhales toxic vapors in presence of police).

G.L. c. 271, §2 (police may make warrantless arrest of person discovered gaming or betting in public place or gaming or betting while trespassing).

G.L. c. 272, §10 (police may make warrantless arrest of person who keeps a house of prostitution).

G.L. c. 272, §59 (police may make warrantless arrest of person for using profanity on the street or public way).

G.L. c. 272, §60 (police may make warrantless arrest of person who litters in presence of the police and refuses to remove the litter upon the request of the police and may detain that person until they establish his/her identity so that a warrant may be issued).

G.L. c. 276, §20B (any officer authorized to serve warrants in a criminal case, may upon reasonable information, make a warrantless arrest of a person who is charged in another state with a crime punishable by death or imprisonment for more than one year).

G.L. c. 276, §28 (police officer may make warrantless arrest of person stealing in presence of police).

G.L. c. 279, §2 (probation officer may make warrantless arrest of probationer).

E. Territorial Limits

With few exceptions, a police officer's power to make a warrantless arrest is limited to the area within the boundaries of the jurisdiction in which he or she is employed. See Commonwealth v. LeBlanc, 407 Mass. 70, 72-73 (1990); Commonwealth v. O'Hara, 30 Mass. App. Ct. 608, 609, (1991). Extraterritorial warrantless arrests are permitted only in four situations: on fresh and continued pursuit; pursuant to a mutual aid agreement; under the Uniform Extra-Territorial Arrest on Fresh Pursuit law; and pursuant to citizen arrest powers.

1. Fresh And Continued Pursuit

General Laws c. 41, §98A allows police officers to make extra-territorial fresh pursuit arrests for any arrestable offense, whether felony or misdemeanor, initially committed in the arresting officer's presence and within his jurisdiction. Thus, for an extra-territorial warrantless arrest to be lawful, the offense must have been committed in the officer's or a fellow officer's presence and must be one for which a warrantless arrest is authorized within the

officer's own jurisdiction. Moreover, the officer must enter the foreign jurisdiction in pursuit of the offender and the pursuit must have been initiated in the officer's own jurisdiction. See Commonwealth v. Gray, 423 Mass. 293, 296 (1996) (plainclothes officer who displayed his police badge by holding it against the window while in his jurisdiction, and was in "fresh and continuous pursuit", had authority to make an extraterritorial arrest of speeding motorist who had refused to stop); Commonwealth v. Savage, 430 Mass. ____ (1999) (invalid extraterritorial arrest where Vermont state trooper, acting on a civilian report of erratic operation, entered Massachusetts without ever seeing the suspect vehicle and without authorization or invitation from Massachusetts State Police, stopped and arrested suspect in Massachusetts for a misdemeanor O.U.I. offense); see also Commonwealth v. Zirpolo, 37 Mass. App. Ct. 307, 310 (1994); Commonwealth v. O'Hara, 30 Mass. App. Ct. 608, 610 (1991).² See also Commonwealth v. Grise, 398 Mass. 247, 252 (1986) (where the police officer's observation, pursuit, and arrest all took place outside the officer's community, the arrest was not based on fresh and continued pursuit and not valid).

² In Commonwealth v. LeBlanc, 407 Mass. 70, 75 (1990), the Supreme Judicial Court ruled that a police officer may not pursue and stop a motor vehicle outside his jurisdiction for any non-arrestable offense, including civil traffic infractions. The Court held that neither the extraterritorial arrest on fresh pursuit law, G.L. c. 41, §98A, nor the motor vehicle citation law, G.L. c. 90C, §2, gives police officers authority to make traffic stops for non-arrestable offenses on fresh pursuit across a town or city line.

2. Mutual Aid Agreements And Assistance Requests

General Laws c. 41, §99, provides that police officers dispatched to another city or town by the officers' mayor, selectmen, chief of police or designated person, or commanding officer, upon the request of the mayor, selectmen, chief of police or designated person, or commanding officer of the other city or town, "shall have the authority of constables and police officers" of that other city or town, except as to the service of civil process. Therefore, if a police officer is sent to assist in another jurisdiction pursuant to G.L. c. 41, §99, the officer has the same authority to make a warrantless arrest as the officers in the jurisdiction to which the police officer has been dispatched. See Commonwealth v. McCrohan, 34 Mass. App. Ct. 273, 284-285 n. 8 (1993). In Commonwealth v. Dise, 31 Mass. App. Ct. 701, 704 n.6 the Appeals Court stated that "[d]espite suggestions in a number of cases that police departments may take the precaution of having their officers sworn in as special officers on the police force of neighboring municipalities, for some reason this procedure does not appear to be often followed." In Commonwealth v. Callahan, 428 Mass. 335, 337-338 (1998), the Court held that Massachusetts cities or towns may requisition an out-of-state police officer to serve as a special police officer pursuant to G.L. c. 41, §99. The Court reasoned that, since the legislature did not impose any territorial limit on G.L. c. 41, §99, the court would not do so.

Pursuant to G.L. c. 37, §13, police officers "may require suitable aid in the execution of their office in a

criminal case, in the preservation of the peace, [or] in the apprehending or securing of a person for a breach of the peace." Refusal to comply is a criminal offense. See Commonwealth v. Morrissey, 422 Mass. 1, 4 (1996).

3. The Uniform Extra-Territorial Arrest On Fresh Pursuit Law

General Laws c. 276, §10A-10D sets forth the Massachusetts provisions of the Extra-Territorial Arrest on Fresh Pursuit Law. New York, Rhode Island, Connecticut, Vermont, and New Hampshire have enacted similar statutes. These statutes permit a police officer in "fresh pursuit" of someone who has committed a felony in Massachusetts to continue into the bordering state in order to make an arrest. After the arrest, the arrestee must be brought before a court within the county in which the arrest took place, and the foreign state's laws of custody, bail, and rendition proceedings are applicable. Similarly, police officers of bordering states have reciprocal rights to pursue a felon into Massachusetts in order to make an arrest.

4. Citizen Arrest

Police officers outside of their jurisdiction may exercise the right of any citizen to arrest someone who "in fact" has committed a felony. Commonwealth v. Dise, 31 Mass. App. Ct. at 704; Commonwealth v. Bean, 25 Mass. App. Ct. 980, 982 (1988); Commonwealth v. Cavanaugh, 366 Mass. 277, 281 (1974). See Commonwealth v. McCrohan, 34 Mass. App. Ct. 277, 281 (1993) ("[W]hen a police officer makes a warrantless arrest outside his jurisdiction . . . he acts as

a private citizen. . . ."). See also Commonwealth v. Claiborne, 423 Mass. 275, 281 (1996) (outside their territory, the police functioned as "private citizens," and required probable cause for a warrantless arrest); Commonwealth v. Owens, 414 Mass. 595, 599 (1993). The "in fact" standard is significantly higher than the "probable cause" standard governing police arrests.

In Commonwealth v. Harris, 11 Mass. App. Ct. 165, 170 (1981), the Appeals Court indicated that a police officer, acting as a citizen in another jurisdiction, may make an arrest on the basis of probable cause when acting to prevent a felon's escape. It is important to note that the court's holding applies only to the situation involving an extra-territorial arrest to prevent a felon's escape.

Later, in Commonwealth v. Dise, 31 Mass. App. Ct. at 704-705, the Appeals Court found that a Ludlow police officer made a lawful citizen's arrest of robbery suspects in Springfield. Although the officer's subjective intent was to conduct a Terry stop, the Court held that he had made a lawful citizen's arrest. See also Commonwealth v. Gullick, 386 Mass. 278, 283 (1982). However, in Commonwealth v. Grise, 398 Mass. 247 (1986), the Supreme Judicial Court refused to uphold the arrest by two off-duty police officers of a person who was operating under the influence, noting that motor vehicle offenses are misdemeanors and do not qualify as a crime for which a citizen may arrest. Compare Commonwealth v. Tynes, 400 Mass. 369, 370-374 (1987) (off-duty police officer who came upon unconscious motorist while jogging outside his

jurisdiction did not effect an arrest when he questioned the motorist and took his keys).

A private Massachusetts citizen may also arrest someone who has in fact committed a felony. See Commonwealth v. Claiborne, 423 Mass. at 280. Only a felony conviction validates a citizen arrest and eliminates the citizen's civil liability for false arrest and imprisonment. Commonwealth v. Colitz, 13 Mass. App. Ct. 215, 220-221 (1982). "The stricter requirement for a citizen's arrest . . . is designed to discourage such arrests and to prevent 'the dangers of uncontrolled vigilantism' Its obvious purpose is to deter private citizens from irresponsible action" Commonwealth v. Harris, 11 Mass. App. Ct. at 1701-171. While there is no requirement that the offense be committed in the citizen's presence, the magnitude of civil liability to which a citizen is exposed if an arrest does not result in a felony conviction serves, in most instances, to deter citizens from effecting arrests for offenses not committed in their presence.

F. Probable Cause Determinations Following Warrantless Arrests.

In Jenkins v. Chief Justice of the District Court Department, 416 Mass. 221, 237-238 (1993), the Supreme Judicial Court held that Article 14 of the Massachusetts Declaration of Rights limits police authority to detain an arrestee subsequent to a warrantless arrest. In the absence of a finding of probable cause, an arrestee can not be detained for longer than 24 hours. Issued in response to Jenkins, Trial Court Rule XI, effective July 1, 1994, establishes a uniform rule for probable cause determinations

for persons under arrest, who were arrested without a warrant, have no outstanding warrant, and are not released on bail.

Under Rule XI, the arresting police department must request a probable cause determination from a judicial officer as soon as reasonably possible after a person's arrest and no later than 24 hours after arrest, absent exigent circumstances. On weekdays, the probable cause determination is made by a clerk or assistant clerk of the local court. On weekends and holidays, clerks are available on a rotating basis to make such determinations. (Note: on weekends and holidays, probable cause determination requests involving alleged violations of a domestic violence restraining order shall be referred to the Judicial Response System.)

The probable cause determination is made at an informal, non-adversal proceeding at which the arrestee has no right to be present or to be represented by counsel. The determination of probable cause is governed by the same legal standards that govern the issuance of an arrest warrant. Any information presented to the issuing clerk or judge must be made under oath or under the pains and penalties of perjury, and it may be presented either orally or in writing. The judicial officer's determination must be reduced to writing and the police must be notified promptly. If no probable cause for the arrest is found, the arrestee must be released promptly.

It is important to remember that an arrestee has the right to a prompt presentment or arraignment at court.

Mass. R. Crim. P. Rule 7(a)(1) Commonwealth v. Butler, 423 Mass. 517, 523 (1996). In Commonwealth v. Rosario, 422 Mass. 48, 56 (1996) the Supreme Judicial Court created a new rule providing for a six-hour window of time after arrest within which police may interview an arrestee without risk that the statements will be suppressed because of violation of the right to speedy arraignment.

VI. EFFECT OF UNLAWFUL ARREST

A. Effect On Right To Prosecute

While an unlawful arrest, whether due to lack of probable cause or violation of state law, violates an individual's constitutional right to be secure against unreasonable seizures, the government nonetheless retains the right to subsequently prosecute the individual. United States v. Crews, 445 U.S. 463, 474 (1980); Commonwealth v. Jacobsen, 419 Mass. 269, 275 (1995); Commonwealth v. Fredette, 396 Mass. 455, 459 (1985); Commonwealth v. Bowlen, 351 Mass. 655, 660 (1967). In Commonwealth v. Jacobsen, 419 Mass. at 276, the Supreme Judicial Court stated, "Dismissal of a [criminal] complaint is a drastic remedy which should be used in only a limited number of circumstances. Absent egregious misconduct or at least a serious threat of prejudice, the remedy of dismissal infringes too severely on the public interest in bringing guilty persons to justice." The Court also noted that it had never ordered charges dismissed in a case of egregious prosecutorial misconduct that did not result in prejudice to the defendant.

B. Incriminating Statements Of The Arrestee

The remedy for an illegal arrest is suppression of the evidence tainted by the police conduct. Thus, incriminating statements made by the unlawfully arrested person are not admissible in court unless the government can show that the officers did not exploit the unlawful arrest to obtain the statements. Wong Sun v. United States, 371 U.S. 471, 488 (1963). In making this determination, a court will look at the totality of the circumstances surrounding the statements. In Brown v. Illinois, 422 U.S. 590, 603-604 (1975), the United States Supreme Court delineated four factors that are relevant to this inquiry:

1. The purpose and degree of the police misconduct;

2. Whether Miranda warnings were given prior to the incriminating statements, and whether the defendant voluntarily, intelligently, and knowingly waived the right to remain silent;

3. The length of time between the unlawful arrest and the incriminating statements (if a significant period of time passed before the statements were made, a court is more likely to conclude that they were not a direct result of the unlawful arrest);

4. The presence of intervening circumstances, such as the use of a phone, release from custody, or a conversation with an attorney.

The primary factor in determining whether the statements of an unlawfully arrested defendant will be admissible at trial is the purpose and degree of police misconduct. See Dunaway v. New York, 442 U.S. 200, 218-219 (1979) (suppressing the defendant's incriminating statements because the police misconduct had been flagrant: the

officers had arrested the defendant without probable cause in the hope of uncovering evidence). Compare Commonwealth v. Fielding, 371 Mass. 97, 113-115 (1976) (the defendant's statements were admissible, where the officers arrested the defendant pursuant to a warrant which they believed to be valid); Commonwealth v. Tisserand, 5 Mass. App. Ct. 383, 390 (1977) (the absence of flagrant misconduct on the part of the police was largely responsible for the court's decision to admit the defendant's incriminating statements: the court noted that the police had acted in good faith reliance on erroneous computer information that there was an outstanding warrant) with Commonwealth v. Hecox, 35 Mass. App. Ct. 277, 285 (1993) (suppressing cocaine seized in plain view when the police stopped the defendant on a warrant which they believed to be in effect, but which in fact had been rescinded five days earlier: the Commonwealth has the burden of showing it is not at fault in failing to update its records).

C. Admissibility Of Physical Evidence

Where the prosecution attempts to introduce physical evidence obtained after an unlawful arrest, the court conducts an analysis similar to the one it uses to evaluate the admissibility of a defendant's incriminating statements. Again, the primary determination is whether the evidence was tainted by the illegal arrest. In United States v. Crews, 445 U.S. 463, 477 (1980), the United States Supreme Court suppressed a pretrial photographic identification because it was the direct result of police exploitation of an unlawful arrest. There, during the course of an assault

investigation, the police wanted to obtain a photograph of a suspect seen in the area of the crime. Lacking probable cause to arrest, but purporting to suspect that the individual was a school truant, the police arrested the defendant for truancy and brought him to the station where he was photographed and then released. The defendant's photograph was subsequently used in an array, and identified by the assault victim. Due to the bad faith on the part of the police in making the arrest, the photographic identification was suppressed. See Commonwealth v. Wedderburn, 36 Mass. App. Ct. 558, 563-564 (1994) (suppressing drugs found on the defendant's person during a search incident to arrest because there was no probable cause to arrest the defendant).

In Commonwealth v. Fredette, 396 Mass. 455, 460-461 (1985), the police arrested the defendant on the mistaken belief that an arrest warrant had been issued. Following arraignment, a judge suppressed the defendant's booking fingerprints on the ground that the arrest was unlawful. The Commonwealth then obtained a court order directing the defendant to provide a new set of fingerprints. In concluding that the use of the new fingerprints was so removed from the original unlawful arrest that their use at trial was not illegal, the Court focused its decision on the fact that there was probable cause for the original arrest and that the officer's failure to obtain a warrant was the fault of the clerk-magistrate.

VII. USE OF FORCE DURING AN ARREST

As a general rule, a police officer may use that degree of force which is reasonably necessary to take someone into custody, to overcome resistance to arrest, to prevent an escape or to recapture an escapee, or to protect officers and others from harm before, during, and after the arrest. See Julian v. Randazzo, 380 Mass. 391, 396 (1980); Commonwealth v. Young, 326 Mass. 597, 602 (1950); 6A C.J.S. Arrest 49 (1975).

The Supreme Judicial Court has adopted the limitations on the use of force contained in 3.07 of the Model Penal Code (Proposed Official Draft 1962):

Section 3.07. Use of Force in Law Enforcement.

1. Use of Force Justifiable to Effect an Arrest.

Subject to the provisions of this Section and of Section 3.09, the use of force upon or towards the person of another is justifiable when the actor is making or assisting in making an arrest and the actor believes that such force is immediately necessary to effect a lawful arrest.

2. Limitations on the Use of Force.

a. The use of force is not justifiable under this Section unless:

- i. the actor makes known the purpose of the arrest or believes that it is otherwise known by or cannot reasonably be made known to the person to be arrested; and
- ii. when the arrest is made under a warrant, the warrant is valid or believed by the actor to be valid.

b. The use of deadly force is not justifiable under this Section unless:

- i. the arrest is for a felony; and
- ii. the person effecting the arrest is authorized to act as a peace officer or is assisting a person whom he believes to be authorized to act as a peace officer; and
- iii. the actor believes that the force employed creates no substantial risk of injury to innocent persons; and
- iv. the actor believes that:
 - 1. the crime for which the arrest is made involved conduct including the use or threatened use of deadly force; or
 - 2. there is a substantial risk that the person to be arrested will cause death or serious bodily harm if his apprehension is delayed.

See Commonwealth v. Klein, 372 Mass. 823, 830-831 (1977). Deadly force is that degree of force which is "intended or likely to cause death or great bodily harm." Id. at 827. A roadblock, if set up in such a way as to be likely to kill a fleeing suspect, may be considered deadly force. Brower v. County of Inyo, 489 U.S. 593, 599 (1989).

An arrestee has no right to resist a lawful arrest. G.L. c. 268, § 32(B) (crime of resisting arrest). In the absence of excessive force by the arresting officer, an

arrestee is not privileged to use force to resist an unlawful arrest if the arrestee knows or reasonably believes that the arresting officer is an authorized police officer. Commonwealth v. Moreira, 388 Mass. 596, 602 (1983). However, an arresting officer has no right to use excessive force before, during, or after an arrest. Whether an officer's use of force was excessive is determined by what was reasonable in light of all the circumstances. Id. at 602. Police may use that degree of force reasonably necessary to overcome an arrestee's resistance. Commonwealth v. Young, 326 Mass. 597, 602 (1950). Where an arresting officer uses excessive force in his attempt to subdue the arrestee, the arrestee has the right to use such force as is reasonably necessary to repel such excessive force. Morreira, 388 Mass. at 602.

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THE LAW OF LINEUPS, PHOTO ARRAYS, AND SHOWUPS

I. IN GENERAL - DUE PROCESS CONSIDERATIONS

Regardless of the method used to identify a criminal suspect, and regardless of whether the suspect has been arrested, the identification procedure followed by the police must not be so unfair as to deprive the suspect of due process of law. Every suspect is entitled to an identification which is not "unnecessarily suggestive and conducive to irreparable mistaken identification" Stovall v. Denno, 388 U.S. 293, 301-302 (1967). See United States v. Wade, 388 U.S. 218 (1967); Commonwealth v. Chase, 372 Mass. 736 (1977). If an unnecessarily suggestive identification procedure is employed, intentionally or unintentionally, the Commonwealth cannot introduce as evidence at trial the selection of the defendant by the witness or victim. Furthermore, if the witness's identification is inadmissible because of undue suggestion, corroborating testimony by police officers is inadmissible as well. Commonwealth v. Santos, 402 Mass. 775, 784 (1988).

Massachusetts courts have avoided establishing specific procedures by which identifications should be made. Rather, the procedures actually employed by the police in a given investigation are examined after-the-fact to determine whether they were "unnecessarily" suggestive in light of the "totality of the circumstances." Commonwealth v. Austin, 421 Mass. 357, 361 (1995); Commonwealth v. Libby, 21 Mass. App. Ct. 650, 654 (1986). See Commonwealth v. Otsuki, 411 Mass. 218, 232-233 (1991). The defendant has the burden of establishing that the identification procedures used were

unnecessarily suggestive by a preponderance of the evidence. Commonwealth v. Miles, 420 Mass. 67, 77 (1995); Commonwealth v. Rogers, 38 Mass. App. Ct. 395, 403 (1995). Because the chances of a successful prosecution are greatly enhanced where police adopt procedures minimizing the possibility of mistaken identification, police officers should be aware of the case law in this area.

Once the defendant establishes, "by a preponderance of the evidence," that the pre-trial identification procedure was unnecessarily suggestive, the results must be excluded from trial regardless of their reliability. Commonwealth v. Johnson, 420 Mass. 458, 472 (1995); Commonwealth v. Botelho, 369 Mass. 860, 865-869 (1976). Should the prosecution seek to use the results of a subsequent identification, i.e., a second police identification or an in-court identification, it may do so only if the prosecution proves by "clear and convincing evidence" that the witness's selection of the defendant has an independent basis free of the harmful effects of the improper viewing. Commonwealth v. Venios, 378 Mass. 24, 30 (1979); Commonwealth v. Correia, 381 Mass. 65, 78 (1980); Commonwealth v. Thornley, 400 Mass. 355, 363 (1987).

To determine whether an identification has an independent basis free of the harmful effects of a prior suggestive identification, the Supreme Judicial Court considers the following factors:

1. The extent of the witness's opportunity to observe the defendant at the time of the crime;
2. The accuracy of the witness's description, and any prior errors
 - (a) in description,
 - (b) in identifying another person, or
 - (c) in failing to identify the defendant;
3. Whether the witness has been exposed to suggestive influences;
4. The level of certainty of the witness; and
5. The time lapse between the crime and the identification.

Commonwealth v. Johnson, 420 Mass. 458, 464 (1995); Commonwealth v. Holland, 410 Mass. 248, 256 (1991). See Commonwealth v. Levasseur, 32 Mass. App. Ct. 629, 636 (1992), rev. denied, 415 Mass. 1104 (1992) (delay is but one factor to be considered in determining in the totality of the circumstances, that the identification was inherently or unnecessarily suggestive).

The witness's opportunity to view the defendant at the time of the crime is the most important of the independent source factors. Commonwealth v. Mendes, 361 Mass. 507, 511 (1972); Commonwealth v. Hill, 38 Mass. App. Ct. 982, 983-984 (1995). Whether the initial observations were made under circumstances likely to fix the perpetrator's identity in the mind of the witness is also significant. See Commonwealth v. Johnson, 46 Mass. App. Ct. 398, 402-403 (1999); Commonwealth v. Cincotta, 6 Mass. App. Ct. 812, 819 aff'd, 379 Mass. 391 (1979). Even though the Commonwealth may be able to prove that a particular identification had an

independent source, unduly suggestive methods of identification employed by police may jeopardize a given prosecution. These materials cover three of the commonly-used methods of identification -- lineups, photographic identifications, and showups -- and discuss procedures which maximize the fairness of the confrontation between eyewitnesses and suspects.

II. LINEUPS

The lineup is the judicially favored method of suspect identification. When carefully arranged, the lineup avoids the suggestiveness of a one-on-one confrontation. Moreover, because it is live, it is more reliable than a photographic identification. Police officers are encouraged to consult with the District Attorney's office before conducting a lineup. But, if that is not possible, the following two objectives should be kept in mind: 1) minimize the chance of a mistaken identification; and 2) eliminate factors which suggest to a witness that a particular participant should be selected. While it may not be possible to remove all suggestive elements from a lineup procedure, the identification made during the lineup will generally be admissible as competent evidence so long as it is not unnecessarily suggestive considering all the circumstances.

A. Compelling A Suspect To Participate

If the suspect is under arrest, or the police have probable cause to believe that he/she has committed the offense for which the lineup is to be conducted, the suspect may be compelled by court order to participate. The Fifth Amendment, protecting an accused from compelled

self-incrimination, is not violated where the defendant is ordered to exhibit himself in a lineup, to wear certain clothing, to make specific gestures, to move in a particular way, to provide a handwriting exemplar, or to speak for the purpose of a voice identification. See United States v. Wade, 388 U.S. 218, 222-23 (1967); Gilbert v. California, 388 U.S. 263, 266-67 (1967); Commonwealth v. DeMaria, 46 Mass. App. Ct. 114, 116-118 (1999). Cf. Commonwealth v. Lydon, 413 Mass. 309, 313-314 (1992) (privilege against self-incrimination under article 12 does not protect against the production of real or physical evidence, such as fingerprints, photographs, lineups, blood samples, handwriting and voice exemplars).

Although the issue has not been addressed in Massachusetts, courts in other jurisdictions have ruled that once a person is lawfully incarcerated he/she may be forced to appear in a lineup for an unrelated crime even though there is not sufficient probable cause to make an arrest or charge him/her with that other crime. See United States v. Anderson, 490 F.2d 785 (D.C. Cir. 1974); People v. Hall, 242 N.W. 2d 377 (Mich. 1976); Pidgeon v. Rubin, 435 N.Y.S.2d 763 (N.Y. 1981). However, a suspect who is not in custody may not be detained for the purpose of conducting a lineup unless the police have probable cause to arrest him. Should the suspect refuse to participate in a lineup or to alter his/her appearance, the police should consult with the District Attorney's Office and seek a judicial order requiring the defendant's cooperation rather than attempting to physically force the desired compliance.

B. Right To Counsel

The first determination that must be made is whether the defendant's Sixth Amendment right to counsel has attached. Generally, this occurs at arraignment. See Commonwealth v. Simmonds, 386 Mass. 234, 237 (1982); Commonwealth v. Key, 19 Mass. App. Ct. 234, 237 (1985). If a lineup is to take place after a suspect has been arraigned, he must be advised that he has a right to have his own or a court-appointed attorney present. Unless the suspect has voluntarily and knowingly waived counsel (preferably in writing), the lineup may not proceed in the absence of counsel.

The Commonwealth cannot intentionally delay a defendant's arraignment in order to circumvent the defendant's right to have counsel present during an in-person identification. If counsel has previously been retained or appointed, the attorney must be advised of the time and place of the lineup and the circumstances relating to the offense charged. If the suspect has knowingly waived counsel, it is incumbent upon the police to make every effort to insure the fairness of the procedure and to maintain an accurate and specific record of what occurred.

C. Lineup Preparations

Before the actual viewing of the lineup, the police must be careful not to suggest to the witness or victim that the alleged perpetrator is among the lineup participants. If the suspect is seen in the custody of police prior to the lineup, or the witness is told that the perpetrator has been arrested and that other implicating evidence has been

recovered, the witness may feel compelled to identify a participant in the lineup.

Therefore, when contacting a witness to arrange a viewing, police should avoid comments such as, "We have arrested a suspect that we want you to identify," since such statements tend to suggest to a witness that the suspect is in the lineup. Neutral statements less likely to be suggestive should be used. For example, a witness or victim may be told, "We would like you to view a number of persons, none of whom may be the perpetrator. This is a standard procedure in investigations of this sort." Comments such as these do not indicate to the witness that a suspect is in custody.

Before conducting the lineup the police should obtain a detailed description of the perpetrator from the witness. While taking the statement, police should isolate multiple witnesses from each other to avoid tainting or influencing their individual recollections. Similarities between the description given to police prior to the lineup and the actual appearance of the defendant will enhance the reliability of the lineup identification.

If counsel for the suspect is present at the lineup, he/she should be permitted to make reasonable suggestions regarding the composition or arrangement of persons within the lineup and the manner in which it is to be conducted. Any suggestions made by counsel, whether incorporated into the lineup or not, should be documented and included in the written report of the lineup.

D. Lineup Composition

To maximize the prospect that a court will conclude that an identification was reliable and therefore properly admitted in evidence, police should make every effort to comply with the following suggested lineup procedures. It is important to display a suspect in a lineup that is properly composed and conducted.

The reliability of an identification is enhanced where the witness views a substantial number of persons prior to selecting the defendant. In other words, police should give the witness the opportunity to view all persons in the lineup before selecting the suspect. Police should include a minimum of four, but preferably six or more, participants in the lineup to impress both the judge and jury that the procedure was not designed to unduly increase the likelihood that the suspect would be chosen. Permit the suspect to take any place in the lineup that he/she desires.

If there are multiple suspects, they may be placed in a lineup together. However, in such circumstances more participants should be added to the lineup. For example, at least ten participants should be used if there are two suspects, and twelve if there are three suspects. No more than three suspects should appear in the same lineup. If the crime was committed by one person and you have two suspects, never put both in the same lineup. Rather, conduct two different lineups and use two different sets of participants.

The least suggestive lineup is obviously one where all of the participants resemble the suspect. The courts do

recognize, however, the difficulties in assembling many persons with characteristics similar to those of a given suspect. Be certain that the suspect is not obviously taller or shorter, heavier or lighter, older or younger, or of a different race than the rest of the participants. Accord, Commonwealth v. Tanso, 411 Mass. 640, 652-653 (1992).

Also, refrain from including in the lineup anyone with whom the witness may be acquainted, including a police officer whom the witness may have seen either investigating the crime or at the police station. Where some of the participants in a lineup have physical characteristics which differ from those of the suspect, the suggestiveness might not be fatal if the difficulty in locating persons with features similar to those of the defendant can be established.

In certain cases the suspect may have a physical characteristic, e.g., a facial scar, which is so predominant and unusual that police will be unable to find persons with similar features. Where undue attention will be focused on the suspect due to such a characteristic, police may wish to forego the lineup and conduct a photographic identification. The suggestiveness of the procedure may be reduced either by locating photographs of similarly appearing persons or by photographing the suspect in a manner which obscures the unusual feature.

Police should avoid dressing the suspect in clothing which will draw attention to him/her during the lineup. Unless all participants are similarly dressed, it is unduly

suggestive to have the suspect appear in clothing similar to that described by the witness. However, despite the suggestiveness, police may present the suspect in the clothing worn at the time of arrest, even if it is similar to those worn at the time of the offense.

Within reason, a suspect may be compelled to alter his/her appearance to conform with the description of the perpetrator. In Commonwealth v. Cinelli, 389 Mass. 197, 205-206 (1983), on the basis of the witness's description that the perpetrator had a slight beard at the time of the offense, the defendant was properly ordered not to shave his beard for several days prior to the lineup in order for his beard to reach the scraggly stage described by the witness. However, if the perpetrator was described as having short hair, it would be unreasonable to order a longer haired suspect to cut his/her hair if that person was arrested so soon after the offense as to preclude the possibility that the hair had grown to the present length.

E. Conducting The Lineup

Bring the witnesses before the lineup one at a time and explain to them the purpose and procedure to be followed. If counsel is present, introduce defense counsel as Mr. or Ms., using the last name. Do not indicate that he or she is counsel for a suspect, or an attorney at all. Once the lineup commences, the suspect's attorney should function as an observer only and should not be permitted to converse with the witness or lineup participants while the lineup is underway.

Avoid any suggestiveness to the witnesses, either in the form of casual comment or by doing anything that makes the suspect stand out from the other lineup participants. After the witness has had sufficient time to view the lineup and has indicated he/she is finished, you should take the witness away from the sight and hearing of the lineup participants and ask whether he/she has recognized anyone.

After a witness or victim has made an identification, you should avoid commenting on the witness's selection. See Commonwealth v. Ayles, 31 Mass. App. Ct. 514, 518 (1991) (police officer's post-identification statement that the person whose photograph had been selected was a suspect in other assaults on women was clearly inappropriate). Any confirming remarks, like "We thought so, but we had to be sure," or "That's the person we arrested," are suggestive and may taint any future identifications (such as in-court identifications) made by the witness.

In a recent case, where the witness expressed doubt regarding her tentative identification and the police made statements to dispel her doubt, the identification was excluded because the witness could not be cross-examined effectively about her original doubt. Commonwealth v. Bonnoyer, 25 Mass. App. Ct. 444, 449 (1988). You should avoid comment, as well, if the witness fails to select the suspect or selects the "wrong" person. It is permissible, however, to ask the witness to be sure of his/her selection, or to ask how sure he or she is about the identification. See Commonwealth v. Coy, 10 Mass. App. Ct. 367, 373 (1980).

F. Joint Viewings By Multiple Witnesses

The obvious pitfall in having multiple witnesses jointly observe a lineup is that if one witness makes an identification, the others may feel pressured to identify the same lineup participant. For example, in Commonwealth v. Marks, 12 Mass. App. Ct. 511, 515-516 (1981), a mother and daughter, both victims of an assault, jointly viewed a suspect. After hearing her mother identify Marks as the perpetrator, the fourteen year old daughter also identified the defendant. Noting that the daughter's selection might have been unduly influenced by her mother's choice, a hearing was ordered to determine if the identification was reliable despite the suggestiveness of the joint viewing. If it is necessary to have multiple witnesses present at a lineup, they should be isolated from each other during the procedure, and each witness should be instructed not to comment on the lineup in the presence of the others.

G. Use Of Two-Way Mirrors

Massachusetts courts have upheld the use of two-way mirrors to separate the witness and suspect during an identification procedure. See Commonwealth v. Lopes, 362 Mass. 448, 453-454 (1972); Commonwealth v. Clifford, 374 Mass. 293, 303 n. 3 (1978). Mirrors avoid suggestiveness by separating the suspect from his/her attorney, protecting the witness from fear of harassment and retaliation, and may ease the nervousness of a suspect which, if apparent, might unfairly attract the attention of the witness.

Police should not use two-way mirrors if the suspect is not represented by an attorney during the lineup. See

United States v. Wade, 388 U.S. 218, 230 n. 13 (1967); Allen v. Moore, 453 F.2d 970, 974 n.1 (1st Cir. 1970). If isolated from the police and the witness, the defendant will be unaware of any suggestive influences or improper procedures which may have taken place during the lineup and will have no way of effectively challenging the reliability of his identification. As an alternative to using a two-way mirror, the witness's identity may be concealed by covering his/her face.

H. Maintaining A Record Of The Lineup

It is imperative that a complete written and detailed record of the lineup procedures be maintained. Should the defendant later challenge the suggestiveness of the procedure, a record of the participants' descriptions and conduct as well as the precise statements and manner in which the witness identified the suspect will be available.

Whenever possible, a color photograph of the lineup should be taken in order to avoid later controversies as to its composition. Any requests for a departure from this method of preservation of the lineup should be directed to the District Attorney's Office.

I. Summary Of Lineup Procedures

1. Determine whether the suspect is entitled to counsel. If so, determine whether the suspect desires counsel or wishes to waive the right to assistance of counsel. If counsel has already been retained or appointed, he or she must be notified.
2. Avoid suggestive comments prior to and during the procedure.

3. Do not allow a witness to observe the suspect in police custody prior to the lineup.
4. Take a detailed description of the suspect from the witness prior to the lineup.
5. Avoid joint viewings by multiple witnesses.
6. Include six or more participants.
7. Make certain that the participants resemble the suspect as best as reasonably possible.
8. No one participant should be singled out--all should be required to stand, move, or speak in the same manner.
9. If the suspect has been described as having a very specific and peculiar physical characteristic, photographic identification should be considered instead of a lineup.
10. Two-way mirrors should not be used where the suspect has waived counsel.
11. Refrain from commenting on the witness's selection.
12. Keep an accurate or detailed written record the lineup procedures.
13. A color photograph of the lineup should be taken.

III. PHOTOGRAPHIC IDENTIFICATION

The use of photographic identification procedures are a valuable investigative tool but should not be used as a substitute for a lineup. Where police are unable to conduct a lineup 1) because there is no definite suspect, 2) where there is a suspect but there is no probable cause to arrest, 3) where the current location of the suspect is unknown, 4)

where the suspect is in custody but a lineup is impractical to arrange because of unwillingness or fear by witnesses, or 5) where the suspect's Sixth Amendment rights have attached and he has been released pending trial, photographic identification may be the best available procedure.

It may also be helpful to create a composite sketch of the suspect. The sketch will be admissible in court as substantive identification evidence as long as it is not created in an unduly suggestive manner. See Commonwealth v. Thornley, 400 Mass. 355, 359-360 (1987). While it is a common investigative practice to show photographs to witnesses, the manner in which it is done is critical and must not deny the suspect due process of law. As with other methods of identification, it is difficult to eliminate all suggestive elements from a photographic identification and it is not per se unconstitutional to conduct a procedure that is in some way suggestive. However, the likelihood of a successful prosecution is increased where the techniques discussed below are followed.

As is true with lineups, no specific permissible procedures have been defined by the courts. Rather, the "totality of the circumstances" is reviewed in each case to determine whether the photographic identification was so impermissibly suggestive as to deny due process of law. See Commonwealth v. Odware, 429 Mass. 231, 235 (1999); Commonwealth v. Thornley, 400 Mass. 355, 360-61 (1987); Commonwealth v. Day, 42 Mass. App. Ct. 242, 249 (1997); Commonwealth v. Laaman, 25 Mass. App. Ct. 354, 361-362 (1988).

A. No Right To Counsel

A suspect has no right to have counsel present during a photographic identification procedure. See United States v. Ash, 413 U.S. 300, 317-319 (1973); Commonwealth v. Johnson, 371 Mass. 862, 868 (1977). However, because counsel is not present to assist in ensuring that the procedure is fair, the police are obliged to take great care to assure that the procedure is not unnecessarily suggestive.

B. Timing

A photographic identification procedure should be conducted as soon as is practical after the commission of the crime so that the witnesses' memories are still fresh. When investigating a recently committed crime where there is no definite suspect, the police should ask witnesses who had a good opportunity to observe the perpetrator to come to the station as soon after the crime as possible to view books of photographs and attempt to discover the identity of the offender.

If there is a definite suspect, an array of photographs, which includes a recent (if possible) photograph of the suspect and photographs of similar-appearing persons should be used. In either situation, the composition of the sample photographs and the manner in which they are presented to the witness are important.

C. Detailed Description Of The Suspect

Prior to showing any photographs to a witness, the police should obtain a detailed description of the suspect from the witness. See Commonwealth v. Miles, 420 Mass. 67, 76 (1995). This will enable the Assistant District Attorney

at trial to show that the witness's memory is consistent with the photograph selected and that it was not disturbed by the examination of the photographs. It is suggested that as many of the following details as can be recalled be obtained:

1. Age and Sex.
2. Race or Color.
3. Height, estimated within two inches.
4. Weight, estimated within five pounds.
5. Build. Thin, slender, medium, and stout.
6. Posture. Erect, slouching, round-shouldered.
7. Head. Size, whether small, medium, or large; and shape, whether round, long, dome-shaped, flat on top, or bulging in the back.
8. Hair. Color; sheen; part; straight or curly; and area of baldness.
9. Face. General impression, followed by a description of the features.
 - a. Forehead. High, low, bulging, or receding.
 - b. Eyebrows. Bushy or thin; shape.
 - c. Mustache. Length; color; shape.
 - d. Eyes. Small, medium, or large; color; clear, dull, blood-shot; separation; glasses.
 - e. Ears. Size; shape; size of lobe; angle of set.
 - f. Cheeks. High, low, or prominent cheekbones; fat, sunken or medium.
 - g. Nose. Short, medium, big, or long; straight, aquiline, or flat; hooked or pug.

- h. Mouth. Wide, small or medium; general expression.
- i. Lips. Shape; thickness, color.
- j. Teeth. Shade; condition; defects; missing elements.
- k. Chin. Size; shape; general impression.
- l. Jaw. Length; shape; lean, heavy or medium.
- 10. Neck. Shape; thickness; length; Adam's apple.
- 11. Shoulder. Width and shape.
- 12. Waist. Size; shape of stomach.
- 13. Hands. Length; size; hair; condition of palms.
- 14. Fingers. Length; thickness; stains; shape of nails; condition of nails.
- 15. Arms. long, medium or short; muscular, normal or thin; thickness of wrist.
- 16. Feet. Size, deformities.

In photographic identification cases, defense counsel routinely cross-examine police officers as to the description of the suspect the witness gave prior to viewing photographs and whether it was recorded in the officer's report. The credibility of the testifying officer and the police work are enhanced by full and detailed reports of identification information. Furthermore, the accuracy and amount of detail given in a description made before a photographic identification procedure will enhance the reliability of the identification itself.

D. Selection Of The Photographs To Be Used

If you have no definite suspect in mind and are giving the witness books of police photographs to look through, you need not be as careful in making sure the photographs are similar. If, for example, high school yearbooks are used, the sample is generally adequate and you are assured all photographs will depict persons of the same age. If your books are separated by race and sex, you should of course only show books of photographs of the same race and sex of the suspect described. If you do have a definite suspect in mind and are preparing an array you should select photographs which resemble the photograph of the suspect that you plan to include and which have the same features that the witness has previously described.

While there is no minimum number of photographs which must be shown to a witness to render an array admissible as evidence, see Commonwealth v. Jackson, 377 Mass. 319, 332 (1979), the reliability of an identification increases as the number of photographs viewed increases. Generally, ten to twelve photographs should be shown in a particular array, but less than that will not automatically render the procedure suggestive. See, e.g., Commonwealth v. Otsuki, 411 Mass. 218, 233 (1991) (11 photographs); Commonwealth v. Lynes, 6 Mass. App. Ct. 834, 834 (1978) (7 to 10 photographs); Commonwealth v. Mattias, 8 Mass. App. Ct. 786, 789 (1979) (7 to 8 photographs). If photographs of two suspects are included in the same array, more photographs are required and a sufficient number of photographs resembling each suspect should be included.

While there is no obligation to display only photographs which contain physical characteristics similar to those of the suspect, the procedure may be unduly suggestive where the suspect's photograph is distinguished from all of the others. For example, the photograph of the suspect should not be in color if the others used are all in black and white. Any difference in the size, shape or type of photographs does not by itself make the array impermissibly suggestive, see Commonwealth v. Worlds, 9 Mass. App. Ct. 162, 167 (1980), but it may give rise to a challenge to the array.

In one case the defendant's photograph was one of two snapshots in an array including eleven mugshots. Commonwealth v. Clark, 378 Mass. 392, 399 (1979). The difference in the type of photographs used in that case did not require suppression primarily because the witness testified that he chose defendant's photograph based on the defendant's facial characteristics and not the type of photograph. Id. at 401. The fact that the defendant's picture has somewhat less contrast between the black and white shades than do the other photographs in the array will also not in itself invalidate the procedure. See Commonwealth v. Chase, 372 Mass. 736, 740 (1977).

Including in an array only one photograph with a distinguishing feature noted in the witness's description of the suspect is inappropriate. In Commonwealth v. Melvin, 399 Mass. 201, 206 (1987), although the identification was upheld despite the fact that the suspect was the only man depicted with an arm in a sling, the Court stated that the

better procedure is to show at least several photographs which contain features similar to those the witness described or conceal the sling. See also Commonwealth v. Kent K., a juvenile, 427 Mass. 754, 762-763 (1998) (array not unduly suggestive where most of the men pictured, like the defendant, had light skin and freckles or facial markings); Commonwealth v. Holland, 410 Mass. 248, 255 (1991); Commonwealth v. Napolitano, 378 Mass. 599, 602-603 (1979). Cf. Commonwealth v. Tarver, 369 Mass. 302, 312 (1976).

But, in another case, the court disapproved of an array where only one of the men whose photographs were included in the array had the hair style described by the witness. Commonwealth v. Gordon, 6 Mass. App. Ct. 230, 239 (1978). Similarly, in Commonwealth v. Thornley, 406 Mass. 96, 99-100 (1989) (Thornley II), an identification was suppressed where the defendant's photograph was the only one in the array showing a man wearing glasses. In that case, the court held that since the defendant's picture was the only one in the array with glasses, the glasses were a major issue in the case, and the witnesses relied on the glasses in selecting the defendant's picture, the array was impermissibly suggestive. Id. at 99-100.

It appears that only where the witness testifies that a photograph was selected based upon the witness's independent recollection of all the defendant's facial features, will an identification be upheld despite the fact that the photograph selected emphasized a particular characteristic

of the defendant. See Commonwealth v. Melvin, 399 Mass. 201, 206 (1987).

E. Sanitizing Prejudicial Information

If police information or other law enforcement data appears on the photographs, it must be redacted. Even if all photographs used are mugshots, each should be sanitized. On the one hand, a witness may be more willing to make an identification, even if uncertain, if he/she thinks whomever is selected has a criminal record. On the other hand, the fact of a record may create fear and reluctance to identify the culprit.

If books of police photographs are used, the witness should be instructed not to take the photographs out of the book. If an array is being used and information appears on the back of the photographs, the witness should not be permitted to view the backs of the photographs. If a packet of photographs is handed to a witness, instruct the witness not to look on the backs, or mask or tape over the information before giving the packet to the witness.

The photographs used in an identification are admissible at trial, but the parties must avoid drawing the jury's attention to their source. See Commonwealth v. Rodriguez, 378 Mass. 296, 309 (1979); Commonwealth v. Smith, 29 Mass. App. Ct. 449, 452-453 (1990). Moreover, at trial the photographs must be sanitized to remove police identification placards, height lines and other identifying or incriminating data. See Commonwealth v. Thayer, 39 Mass. App. Ct. 357, 398-400 (1995) (robbery conviction set aside where jury viewed photograph of defendant which had

incriminating information on back and was inadequately sanitized).

Courts prefer only full face photographs be shown to the jury, not profiles. See Commonwealth v. Blaney, 387 Mass. 628, 637-639 (1982). Therefore, while it is not required it is desirable that the array be conducted in this same manner. See also Commonwealth v. Payton, 35 Mass. App. Ct. 586, 590-591 (1993) (test for admitting ordinary mug shots into evidence at trial "includes the following: 'the prosecution must show some need to introduce the mug shots; [and] the mug shots, to the extent possible, should not indicate a prior record. . . and. . . should not call attention to their origins and implications'" (citations omitted)).

F. Avoiding Suggestive Comments Or Behavior

Witnesses should not be told they are looking through "mug books." Rather, refer to the books as "photograph books." Prior to displaying the photographs, the witness should not be told that the photograph of a suspect is included, or that an arrest has been made. Throughout the procedure, refrain from doing or saying anything that points out or suggests a particular photograph to the witness. Where police convey their belief that the perpetrator's photograph is included in the array, while not automatically suggestive, the witness may feel pressured to make an identification of that person. See Commonwealth v. Toto, 15 Mass. App. Ct. 941 (1983); Commonwealth v. Allen, 22 Mass. App. Ct. 413, 416-417 (1986).

After a witness or victim has made an identification, do not in any way indicate whether it was a "correct" or "incorrect" selection. See Commonwealth v. Ayles, 31 Mass. App. Ct. 514, 515 (1991). A police officer telling a witness whether he/she thinks the witness is right or wrong is a suggestive occurrence, and raises the question whether future identifications are the result of the witness's memory from the crime, or a result of being told by the officer that he/she made a correct photographic selection.

In a case where the witness expressed doubt regarding her tentative identification and the police made statements to dispel her doubt, the identification was excluded because the witness could not be cross-examined effectively about her original doubt. Commonwealth v. Bonnoyer, 25 Mass. App. Ct. 444, 448-449 (1988). See also Commonwealth v. Riley, 26 Mass. App. Ct. 550, 556 (1988).

Any confirming remarks, such as "We thought so, but we had to be sure," or "That's the person we arrested," are inappropriate. The same is true if the witness does not select anyone and the suspect's photograph is included, or the witness selects the "wrong" person. As with lineups, however, it is permissible to ask the witness to be sure of his/her selection. See Commonwealth v. Coy, 10 Mass. App. Ct. 367, 373 (1980). It is also permissible to instruct the witness to concentrate on facial features. Commonwealth v. Holland, 410 Mass. 248, 254 (1991).

G. Repeated Exposure Of Suspect's Photograph

Showing a suspect's photograph more than once can be suggestive. Thus, police should avoid repeatedly displaying

a suspect's photograph in either the same or in subsequent arrays. While it is not impermissible per se to include two photographs of the same suspect in an array, this practice should be avoided. See, e.g., Commonwealth v. LaFaille, 430 Mass. 44, 48 (1999) (two dissimilar photographs of defendant in array of eight) Commonwealth v. Kostka, 370 Mass. 516, 523 (1976) (two photographs of defendant in array of twelve); Commonwealth v. Riley, 17 Mass. App. Ct. 950, 950 (1984) (two photographs of defendant in array of thirteen); Commonwealth v. Avery, 12 Mass. App. Ct. 97, 101-102 (1981) (three photographs of defendant in array of eighteen); Commonwealth v. Vasquez, 11 Mass. App. Ct. 261, 266 (1981) (defendant's photograph appeared twice on same page of mugbook).

Police should also proceed with caution in displaying a photograph (particularly the same photograph) of the suspect to the same witness in subsequent arrays. In such circumstances, the admissibility of the identifications is determined with reference to the totality of the circumstances. Commonwealth v. Awad, 47 Mass. App. Ct. 139, 147 (1999) (although defendant's photograph appears in two arrays, the photograph differed enough to prevent any danger of suggestiveness) Commonwealth v. Wallace, 417 Mass. 126, 130 (1994) (although defendant's photograph was shown to witnesses in two consecutive photo arrays -- one in black and white and the other in color -- two different photographs of defendant were used, and defendant appeared different in each photo).

If an identification was not made at first, repeated exposure can convey police suspicions to the witness and create impermissible suggestiveness. See Commonwealth v. Paszko, 391 Mass. 164, 169-170 (1984); Commonwealth v. LaPierre, 10 Mass. App. Ct. 641, 643-644 (1980); Commonwealth v. Mayo, 21 Mass. App. Ct. 212, 216-218 (1985). The situation may be less suggestive, however, if at the initial procedure there was no suspect and the witness looked through a large number of photographs. See Commonwealth v. Holland, 410 Mass. 248, 254 (1991). See also Commonwealth v. Dinkens, 415 Mass. 715, 719-721 (1993) (identification not suggestive where victim tentatively identified defendant from array of 200 photographs and police subsequently included defendant's photograph in an array of nine photographs one month later).

Likewise, the absence of defendant's photograph from an initial array of 300 photographs and its subsequent inclusion in two other arrays each containing eight photographs drawn from the original array of 300 photographs was not unduly suggestive. Commonwealth v. Smith, 414 Mass. 437, 443 (1993). Keep in mind, however, that once an identification has been made, there is generally no reason to seek another one.

H. Showing A Single Photograph

While showing a single photograph of a suspect to a witness is not per se prohibited, it should be avoided. See Commonwealth v. Otsuki, 411 Mass. 218, 234 (1991). Only when there is "good reason" for the police to use a one-on-one identification procedure will the single photo

identification be admissible. Commonwealth v. Austin, 421 Mass. 357, 361-362 (1995). Often, the good reason will take the form of exigent circumstances. See Commonwealth v. Moon, 380 Mass. 751, 757-758 (1980). See also Commonwealth v. A Juvenile, 402 Mass. 275, 280 (1988). For example, where the victim has been seriously wounded and is near death, the exigency of the situation will justify the use of a single photograph. See Commonwealth v. Nolin, 373 Mass. 45, 51 (1977); see also Commonwealth v. Moynihan, 376 Mass. 468, 476-477 (1978); Commonwealth v. Corfield, 1 Mass. App. Ct. 660, 667 (1974).

In Commonwealth v. Moon, 380 Mass. 751, 757-758 (1980), the court suppressed the identification made as a result of showing the witness one photograph (the defendant's driver's license) because there was no exigency requiring such a showing. Contrast, Commonwealth v. Austin, 421 Mass. 357, 364 (1995) (surveillance tape depicting single suspect properly used for identification where there was serious risk to public safety). Such a suggestive photograph identification may also taint the witness's later in-court identification of the defendant. See Commonwealth v. Riccard, 410 Mass. 718 (1991). But see Commonwealth v. Hill, 38 Mass. App. Ct. 982, 983 n.2 (1995) (court noted that identification by single photo permissible where witness was sure of suspect and gave detailed description; photo simply supplied a name).

Yet in Commonwealth v. Venios, 378 Mass. 24, 29 (1979), a single photograph identification was permissible in part because the witness had viewed numerous photographs the

previous day and showing the single photograph was "to some extent a continuation of an ongoing process of working through police photographs." Id., quoting Nassar v. Vinzant, 519 F.2d 798, 801 (1st Cir.), cert. denied, 423 U.S. 898 (1975). The court, however, did not approve of the practice because the photograph could have been placed in an array rather than shown singly.

I. Joint Viewing By Multiple Witnesses

As with lineups there is no good reason to conduct a joint viewing of photographs. The same is true for joint composite sketches. To avoid the witnesses' influencing each other, they should be isolated from each other while preparing composite sketches or viewing photographs. They should be instructed not to indicate whether they can make an identification until they are separated from other witnesses.

J. Maintaining A Written Record

A defendant is entitled to discovery as to whether any out-of-court identification has occurred, and to be informed as to the procedures that were employed. This discovery right extends to information concerning the conduct of the procedure, the composition of the photograph sample, and the witness's failure to make an identification (and if so, whether defendant's picture was included in the array or not). See Commonwealth v. Rodriguez, 378 Mass. 296, 308 (1979). See also Commonwealth v. Clark, 378 Mass. 392, 402-403 (1979); Commonwealth v. Walker, 14 Mass. App. Ct. 544, 549 (1982).

Police officers who conduct identification procedures should maintain a written record of not only the photographs included, but all statements made by the officer and the witness during the procedure. All photographs used should be retained, and notes should be made regarding which photograph (if any) was selected, the exact layout or order of how the photographs were displayed, and what steps (if any) were taken to redact any suggestive aspects of the photographs. See Commonwealth v. Caldwell, 36 Mass. App. Ct. 570, 579-80 (1994); Commonwealth v. Muse, 35 Mass. App. Ct. 466, 470 n.1 (where court suggested that it would be helpful "for the Commonwealth to present evidence that a photograph selected by a witness soon after the commission of a crime was marked in some way to indicate that selection").

If that is not possible, take a separate photograph of the whole array or the pages in a book of police photographs as they appeared when viewed by the witness. See Commonwealth v. Miles, 420 Mass. 67, 77 (1995) (where Supreme Judicial Court viewed photo array in order to determine whether array was unnecessarily suggestive).

K. Summary Of Photographic Identification Procedures

1. Prior to the showing, take a detailed description of the suspect from the witness.
2. Avoid suggestive comments and prompting of the witness prior to, during and after the showing.
3. Avoid joint viewings. Separate witnesses or instruct them not to indicate whether they can identify anyone until isolated after the showing.

4. Maintain a written record as to which photographs were shown and the sequence in which they were viewed. Retain the photographic array. Record the words and manner in which the witness identified the suspect.
5. Include preferably ten to twelve photographs in the array.
6. Include photographs of persons with features similar to those of the suspect.
7. Avoid singling out the suspect's photograph by using similar sizes and types of pictures and by "sanitizing" mugshots.
8. Avoid repeatedly showing the suspect's photograph to the witness in the same or subsequent arrays.
9. Absent exigent circumstances, do not show a single photograph to the witness.

IV. SHOWUPS

One-on-one confrontations for the purpose of identification are disfavored because they are viewed as inherently suggestive. Nevertheless, a one-on-one pretrial identification raises no due process concerns unless it is "unnecessarily" suggestive. Whether a showup is unnecessarily suggestive turns on whether "good reason" exists for the police to use a one-on-one identification procedure. Relevant to the good reason inquiry are (1) the nature of the crime involved and corresponding concerns for public safety; (2) the need for efficient police investigation in the immediate aftermath of a crime; and (3) the usefulness of prompt confirmation of the accuracy of investigatory information, which, if in error, will release the police quickly to follow another track. Commonwealth v.

Austin, 421 Mass. 357, 361-362 (1995). See also Commonwealth v. Thompson, 427 Mass. 729, 735 (1998) (one-on-one showup shortly after robbery was justified where the procedure established a connection between the stolen goods and the suspects and permitted witnesses to view the suspects while their recollections were fresh).

Although showups are not per se unconstitutional, Commonwealth v. Santos, 402 Mass. 775, 781 (1988); Commonwealth v. Jones, 25 Mass. App. Ct. 55, 61 (1987); Stovall v. Denno, 388 U.S. 293, 301-302 (1967), police officers should recognize that other procedures are preferable. See Commonwealth v. Bowden, 379 Mass. 472, 479 (1980); Commonwealth v. McMaster, 21 Mass. App. Ct. 722, 725-726 (1986). Furthermore, at trial it is permissible for the defendant to establish and argue that fairer procedures were available to the police at the time of the showup.

A. Showup Made Promptly After Commission Of Crime

Although a showup is inherently suggestive, the procedure may be justified if it is conducted promptly after the crime under investigation is committed. The advantages of such an immediate identification override the suggestiveness of the setting such that the courts accept the procedure as sound police practice. See Commonwealth v. Dickerson, 372 Mass. 783, 790-791 (1977); Commonwealth v. Lifsey, 2 Mass. App. Ct. 835, 835 (1974); Commonwealth v. Gauthier, 21 Mass. App. Ct. 585, 587-588 (1986).

Such confrontations permit the witness to view the suspect while recollection is still fresh and before other images crowd in to distort the original picture. . . .

'[A] prompt confrontation yielding a negative result, besides freeing the innocent, informs the police that a possible predisposition on their part is or may be in error and releases them quickly to follow another track.'

Commonwealth v. Coy, 10 Mass. App. Ct. 367, 372 (1980);
Commonwealth v. Barnett 371 Mass 87, 92 (1976).

There is no specific time after a crime within which a showup must be conducted. One-on-one confrontations have been upheld several hours after the commission of a crime. See e.g., Commonwealth v. Leaster, 362 Mass. 407, 411 (1972) (1-1/2 hours); Commonwealth v. Denault, 362 Mass. 564, 566 (1972) (1-3/4 hours); Commonwealth v. Dickerson, 372 Mass. at 791 (2 hours); Commonwealth v. Farmer, 5 Mass. App. Ct. 871, 871-872 (1977) (4 hours); Commonwealth v. O'Loughlin, 17 Mass. App. Ct. at 972 (3 hours). But see Commonwealth v. Walker, 421 Mass. 90, 95-96 (1995) (16 day delay in showup not suggestive where it occurred moments after witness had seen the defendant again by chance).

However, police are strongly advised to consider conducting a lineup or other procedure once a few hours have lapsed even if the investigation is still in progress. See Commonwealth v. Storey, 378 Mass. 312, 319 (1979). The justification for conducting a prompt showup decreases proportionately as time passes See Commonwealth v. Johnson, 420 Mass. 458, 460-461 (1995) (showup one day after incident too suggestive).

Although voice identifications are disfavored, if a suspect says something during the showup, the witness' identification of the suspect's voice is generally admissible. (see section VI, *infra*.) However, the suspect should not be asked to speak the words that were uttered by the perpetrator of the crime. See Commonwealth v. Burgos, 36 Mass. App. Ct. 903, 904-905 (1994) (victim makes visual identification, then defendant says something and victim makes voice identification); Commonwealth v. O'Loughlin, 17 Mass. App. Ct. 972, 972 (1984) ("There was no impropriety in allowing the victim to listen to the defendant's voice as part of the identification process. The police officers engaged the defendant in normal conversation rather than requiring him to speak the words uttered by the assailant during the rape").

A showup may be conducted by bringing the suspect to the witness or to the scene of the crime, Commonwealth v. Leonardi, 413 Mass. 757, 760 (1992); Commonwealth v. Crowley, 29 Mass. App. Ct. 1, 3-4 (1990); Commonwealth v. Bumpus, 354 Mass. 494, 500 (1969); by bringing the victim to the suspect, Commonwealth v. Lifsey, 2 Mass. App. Ct. 835, 835 (1974); or by bringing both parties to a third location nearby, Commonwealth v. Salerno, 356 Mass. 642, 646-47 (1970). In Commonwealth v. Crowley, 29 Mass. App. Ct. 1, 4-5 (1990), where: 1) the police knew a crime had been committed; 2) the total period of detention of the defendant was short; 3) the crime scene to which the defendant was taken was very close, and the eyewitnesses were there; and 4) there was no proof of significantly less intrusive means

available to accomplish the identification, it was appropriate for the police to transport the defendant to the witnesses at the crime scene to confirm or dispel the officers' suspicions quickly. However, to avoid a challenge to the detention itself, the preferred practice is to detain the suspect and bring the witness to his location. Do not under any circumstances take a suspect to the police station before arranging the showup.

It is permissible for officers to transport a victim or witness in a police cruiser to survey the area where a crime has just occurred in order for him/her to point out the perpetrator, if possible. During this time, however, police must avoid making any comments to the victim or witness which could be considered suggestive or prejudicial. If the witness indicates that he/she sees someone who resembles the perpetrator, that person may be detained briefly for the purpose of making the identification. At this point you must still guard against unnecessary suggestiveness. If the witness fails to make a prompt identification, and there is not sufficient evidence otherwise to provide probable cause to arrest, the suspect must be released.

If the witness has given a description of the perpetrator and a suspect who matches that description has been stopped, it is permissible to detain the suspect for a short period of time to bring the witness to the suspect's location for the purpose of identification. See Commonwealth v. Breen, 357 Mass. 441, 447 (1970); Commonwealth v. Salerno, 356 Mass. 642, 646-647 (1970). You may detain the suspect only for as long as you normally

would be allowed if conducting a threshold inquiry concerning a recently committed crime. This is typically the length of time reasonably necessary to clear up any reasonable suspicion. For example, if the witness has given a detailed description which the suspect matches, and the suspect is found near the scene of the crime, that would provide reasonable suspicion to stop and detain the suspect for a short period of time so that the witness could be brought to the suspect, or vice versa, for purposes of identification.

The degree of detail of the description given, the time lapse since the crime, the proximity of the suspect's location to the scene of the crime and the manner in which the suspect fled are relevant considerations in determining the appropriate length of time of the detention. Beyond this there are no set rules concerning how long a suspect can be detained for the purpose of having a witness make an identification. In one case it was deemed permissible for police to detain a truck and its occupants for twenty-five minutes so that an identification could be made, where the initial stop was made within thirty minutes of the crime. Commonwealth v. Tosi, 14 Mass. App. Ct. 1029, 1030 (1982). Detention of a suspect longer than is reasonable considering the above-listed factors could invalidate the stop itself, and any subsequent identification.

B. Exigent Circumstances

Exigent circumstances may justify a showup even if it is not conducted promptly after the crime under investigation. Such circumstances exist where the suspect or witness is,

and will remain, unable to participate in a lineup for an extended a period of time. This typically will involve medical emergencies where either a witness or a suspect is in imminent danger of death or in critical condition. In Stovall v. Denno, 388 U.S. 293, 302 (1967), the United States Supreme Court upheld an in-hospital showup conducted after the suspect was brought before a critically injured witness in imminent danger of death.

Similarly, in Commonwealth v. Barnett, 371 Mass. 87 (1976), a uniformed security guard was shot during an attempted armed robbery. Following the capture of the suspect, who also required medical attention, he was transported to the same hospital as the guard. The one-on-one identification which took place in the hospital was reasonable in the circumstances because of the exigency of the situation. Id. at 91-92; see also Commonwealth v. Leonardi, 413 Mass. 757, 760-762 (1992); Commonwealth v. Harris, 395 Mass. 296, 299 (1985); Commonwealth v. Nolin, 373 Mass. 45, 51 (1977); Commonwealth v. Coy, 10 Mass. App. Ct. 367, 372 (1980).

If there is an exigency necessitated by the medical condition of the witness, the District Attorney's office should be asked to participate in making the necessary arrangements for a hospital showup. The permission of the hospital and the patient's physician should be sought. Emergency identification procedures are subject to all due process requirements regarding the elimination of suggestiveness, but should also be conducted in a manner consistent with the physical condition of the patient.

C. Minimizing Suggestiveness

Because there is an inherent suggestiveness in all showup identifications, police must make every effort to eliminate further suggestiveness. See Commonwealth v. Leonardi 413 Mass. 757, 760-61 (1992) (would have been better for officer not to say we have someone who fits your description); Commonwealth v. Rogers, 38 Mass. App. Ct. 395, 403-404 (1995) (showup is inherently suggestive because witness knows he would not be asked to make an identification of a particular person unless police had reason to suspect person's involvement).

The procedure must be conducted in a fair and non-prejudicial manner. In Commonwealth v. Santos, 402 Mass. 775, 781-782 (1988), a showup was unconstitutionally suggestive because the witness had mental limitations and was easily influenced. The witness had previously described his assailant as black but there was no indication that the witness had seen the assailant for a sufficient amount of time to make an identification. Thus, a one on one showup between the witness and the only black man present was unconstitutionally suggestive.

Where the witness has mental limitations, it is especially important to avoid any possible suggestiveness. Police officers should not convey to the witness their suspicions or say anything concerning the suspect except that they wish the witness to look at a person. Nor should the police do or say anything that might convey to the witness that the suspect has admitted guilt or that other facts regarding the crime have been confirmed. If security

permits, the suspect should not be in handcuffs or seated in a cruiser during the confrontation. But see Commonwealth v. Bowden, 379 Mass. 472, 479 (1980); Commonwealth v. Rogers, 38 Mass. App. Ct. 395, 404 (1995).

A police officer's use of a flashlight to illuminate the face of a suspect involved in a show-up is permissible, because it does not add significantly to the suggestiveness inherent in the show-up procedure. Commonwealth v. Drane, 47 Mass. App. Ct. 913, 913 (1999). In all cases the suspect should be viewed by one witness at a time out of the presence or hearing of all other witnesses. See Commonwealth v. Rogers, 38 Mass. App. Ct. 395, 402-403 (1995). Likewise, if the crime involves more than one perpetrator, each should be presented to the witness individually, rather than as a group. See id. at 404.

D. Maintaining A Written Record

As with all identifications, a written record of the details of the procedure followed along with any statements made by witnesses during the identification should be made. A detailed written record is particularly important with showups because of the absence of defense counsel and the inherent suggestiveness involved in the process. Therefore, it is very important to record all circumstances surrounding a showup including time, place, lighting conditions and all persons present. Be particularly alert for any spontaneous remarks made by the identifying witness since such statements are helpful in showing that the identification was a result of memory and not the suggestiveness of the show up itself.

E. Summary of Showup Procedures

1. Use only where a showup can be conducted promptly after a crime or if an exigency prohibits the use of another form of identification.
2. Conduct a showup only within a few hours of crime under investigation. Beyond that time frame, consider alternative identification procedures.
3. The preferred practice is to bring the witness to the suspect rather than the suspect to the witness, unless the suspect is already under arrest.
4. Avoid suggestive comments or conduct during and after the showup.
5. Detain suspect for the least amount of time possible.
6. Exigent circumstances justifying showups conducted more than a few hours after the crime typically involve suspect or witness hospitalization. Consult with the District Attorney's Office and hospital personnel before conducting an in-hospital showup.
7. Only allow one witness to see one suspect at a time.
8. Maintain a written record detailing time, place, manner, lighting, and those present at the showup.

V. FIELD CONFRONTATIONS

While police may arrange informal, non-custodial opportunities for witnesses to observe possible suspects, being contrived confrontations, they must not be so suggestive as to deny due process of law. See Commonwealth v. Chase, 372 Mass. 736, 743 (1977); Commonwealth v. Walker, 14 Mass. App. Ct. 544, 550-552 (1982). The field confrontation, a valuable tool where the suspect is not in

custody, is conducted by bringing the witness to a public area in which the suspect is likely to be found.

A. Conducting A Field Confrontation

Distinguished from the highly suggestive one-on-one showup in which attention is intentionally focused on the suspect, the field confrontation must be conducted in an area occupied by enough people as to prevent isolation of the suspect, and must be void of suggestive comments or conduct tending to direct the witness's attention to the possible perpetrator.

In Commonwealth v. Walker, 14 Mass. App. Ct. 544 (1982), at the request of police, two rape victims walked through the public park in which they were assaulted the previous day. The perpetrators, present in the park, were observed and identified by the victims. The court approved of the police procedure, stating that the "police did not walk with the victims or direct their attention to any particular spot." Id. at 550. Similarly, an identification which took place in a crowded public bar was upheld in Commonwealth v. Chase, 372 Mass. 736, 744-745 (1977).

A witness to a homicide was taken by police to a lounge at which twenty-five patrons and at least two bartenders were present. After observing the bar's occupants, the witness identified one of the bartenders as being the perpetrator. The Court stated that "informal pre-arrest identification procedure[s] . . . not involving just the witness and the defendant, have been sustained as constitutionally acceptable." Id. at 743.

In Commonwealth v. Levasseur, 32 Mass. App. Ct. 629, 635-637 (1992), a rape victim described her assailant to the police and selected his photograph. After the victim selected the photograph, the police made no comments to the victim concerning the man whose picture she had selected. Due to the serious nature of the charge, the victim declined to make a positive identification without first seeing the defendant (who was no longer willing to speak or cooperate with the police), and the police did not delay in attempting to accommodate her request.

The Court concluded that in the totality of the circumstances, the action of a police officer in taking the victim to a place where the defendant might show up, "was not so unnecessarily suggestive and conducive to misidentification as to deny the defendant due process of law." Id. at 637. In so doing, the Court placed much weight on the fact that the police did not act unreasonably in not arresting the defendant before a positive identification was made, and that the procedure was not used to avoid identification at a lineup.

Those field confrontations which occur prior to a preliminary hearing, arraignment, indictment, or other judicial proceeding, involve no Sixth Amendment right to assistance of counsel or obligation on the part of the police to notify the suspect of the procedure. However, police should use caution in employing these types of planned encounters, and should seek advice from the District Attorney's Office whenever this type of identification procedure is contemplated.

B. In-Court Identifications

Police may bring a witness into court to view a suspect; however, they must insure that the setting is not so suggestive as to deny the defendant due process of law. Though a suspect may be handcuffed and in the prisoner's dock, the viewing may not be unduly suggestive if the courtroom is crowded, there are other prisoners in the dock, and the officer does not direct the attention of the witness to the suspect. See Commonwealth v. Napolitano, 378 Mass. 599, 605-606 (1979); See also Commonwealth v. Colon-Cruz, 408 Mass. 533 (1990); Commonwealth v. Johnson, 46 Mass. App. Ct. 398, 401-403 (1999).

Such a procedure was upheld in Commonwealth v. Marks, 12 Mass. App. Ct. 511, 515-516 (1981), where an assault victim was brought to the court house to view a suspect who was present on unrelated charges. To avoid undue suggestiveness, the officer instructed the witness to view each person encountered and walked her through a crowded hallway and two rooms before bringing her into the courtroom where the suspect was observed and identified.

Compare the procedure employed in Commonwealth v. Botelho, 369 Mass. 860, 861-865 (1976), which was so suggestive as to create an unreasonable risk of misidentification. There the witness was taken to the courthouse, and while parked in a car by the rear exit, observed the suspect in handcuffs being led out of the building by two uniformed officers. The lack of other persons in the area unnecessarily isolated the defendant causing a suggestive and unreliable identification.

Police should use caution in employing an in-court identification procedure because of the danger of suggestiveness. You should not use a clerk's hearing, probable cause hearing, or other pre-trial hearing as a substitute for a non-suggestive identification procedure. Furthermore, when police are seeking an in-court identification in a case on which the defendant has already been arraigned, defense counsel must be notified.

And, although a suspect in court on unrelated charges may not have a right to assistance of counsel during a viewing, the Supreme Judicial Court has indicated that where court proceedings are being used for identification purposes, the judge should be notified that the defendant is suspected in an unrelated crime and that a witness is being asked to identify him/her. See Commonwealth v. Napolitano, 378 Mass. 599, 607-608 (1979).

Alternatively, if represented by counsel, the suspect's attorney should be notified prior to the viewing. Id. at 608. See also Commonwealth v. Colon-Cruz, 408 Mass. 533 (1990). The District Attorney's office should be consulted whenever an in-court identification is contemplated to insure that the proper notifications are made and that all due process and right to counsel requirements are satisfied.

C. Accidental Encounters

Accidental encounters between a victim or witness and a suspect, where the police do not attempt to elicit an improper identification, do not ordinarily result in suppression of the resulting identification. See e.g., Commonwealth v. Leaster, 362 Mass. 407 (1972); Commonwealth

v. Calhoun, 28 Mass. App. Ct. 949, 950-951 (1990). See also Commonwealth v. Walker, 421 Mass. 90, 95-96 (1995) (witness's chance encounter with suspect 16 days after crime justified immediate showup). However, the courts will look to the totality of the circumstances, even absent police misconduct, and if the circumstances were unnecessarily suggestive or conducive to irreparable mistaken identification, the identification will be suppressed. See Commonwealth v. Jones, 423 Mass. 99, 106-109 (1996).

Although circumstances creating an accidental encounter are in most cases beyond the control of the investigating officers, steps can be taken to minimize the likelihood of a chance encounter. For example, in Commonwealth v. Day, 42 Mass. App. Ct. 242, 248-250 (1997), two eyewitnesses to a shooting spent twenty to thirty minutes sitting in a police station reception area waiting to view a photographic array. The Appeals Court concluded that the motion judge should have suppressed the subsequent photographic identification because while they were in the reception area, the witnesses saw a "wanted" flyer with a photograph of the defendant on it. The flyer also included a description of the crime for which the defendant was wanted (the shooting), a warning that the defendant was armed and dangerous, and other information implying that he had a prior record. But see Commonwealth v. Odware, 429 Mass. 231, 234-236 (1999) (identifications were admissible at trial because the suggestive circumstances were not the result of police activity; the witnesses were attending the victim's wake at the time when they viewed a flyer depicting the defendant).

The police should make every effort to avoid any contact between an eyewitness and a suspect in a suggestive setting. The reliability of a lineup identification is much greater and is less open to challenge than an identification resulting from an accidental encounter in a suggestive setting.

VI. VOICE IDENTIFICATIONS

Although a suspect may be identified by his voice as well as by any other feature, the courts have cautioned that special care must be used in conducting a voice identification procedure. The Supreme Judicial Court has set forth specific guidelines for police and prosecutors to follow. The court suggested that one-on-one encounters be avoided. But see Commonwealth v. Burgos, 36 Mass. App. Ct. 903, 904-905 (1994) (voice identification at a showup was admissible where the victim made visual identification and defendant then said something without being prompted). The procedure should be conducted similar to a lineup, except that witnesses should not view the participants; rather, the witnesses should hear each participant speak, one by one. The words chosen for repetition should not be those heard by the victim at the scene. Finally, the procedure should be conducted as soon after the incident as possible. Commonwealth v. Miles, 420 Mass. 67, 80 (1995); Commonwealth v. Marini, 375 Mass. 510, 516-519 (1978). See also Commonwealth v. Gauthier, 21 Mass. App. Ct. 585, 587-588 (1986).

In a recent Appeals Court case, Commonwealth v. DeMaria, 46 Mass. App. Ct. 114 (1999), a voice identification was

conducted immediately following a visual lineup identification. For the visual lineup, the defendant wore a placard bearing the number four. During the voice identification procedure several minutes later, the victim stood with her back to the men in the lineup and the defendant was introduced as "number four" before he was asked to speak. The court held that the consistent use of the number four in relation to the defendant was not "so suggestive as to deprive the defendant of due process of law." Id. at 118. However, the court stated that it was preferable for police to give a suspect different numbers for the purpose of conducting both a visual and voice lineup. Id.

Train2

THE LAW OF INTERROGATION

This section reviews the constitutional and common law rights which are called into play by a police officer's interrogation of a suspect. Familiarity with these rights is crucial because statements elicited in violation of them, and in many instances the "fruits" of these statements, will not be admissible at trial.

Specifically, this section reviews the following constitutional and common law rights:

- (i) a suspect's right to have only his voluntary statements used against him;
- (ii) a suspect's right to be warned prior to custodial interrogation of his right to remain silent and to have a lawyer present during questioning;
- (iii) a suspect's right once formal charges have been brought against him to be assisted by a lawyer during questioning; and
- (iv) a suspect's right to a prompt arraignment after arrest.

I. ONLY VOLUNTARY STATEMENTS MAY BE USED AGAINST A SUSPECT

The Fifth and Fourteenth Amendments to the United States Constitution, and Massachusetts law, permit the Commonwealth to use a suspect's statements as evidence against him only if the statements were made voluntarily. Miranda v. Arizona, 384 U.S. 436 (1966); Colorado v. Connelly, 479 U.S.

157 (1986); Commonwealth v. Allen, 395 Mass. 448 (1985). However, courts have traditionally had a difficult time defining "voluntary." See Commonwealth v. Davis, 403 Mass. 575, 581 (1988). Some courts hold that a voluntary statement is one which is "the product of a rational intellect." Commonwealth v. Johnston, 373 Mass. 21, 25 (1977); Commonwealth v. Benjamin, 399 Mass. 220, 222 (1987). Other courts define a voluntary statement as one which is "the product of any meaningful act of volition." Blackburn v. Alabama, 361 U.S. 199 (1960); Commonwealth v. Masskow, 362 Mass. 662 (1970). However defined, it is clear that Massachusetts courts employ a two prong analysis when evaluating whether a statement is voluntary. First, the speaker must not have been coerced into making the statement. Second, the speaker must have been rational when the statement was given. Commonwealth v. Callahan, 401 Mass. 627, 631 (1988).

A. Coerced Statements - The Factors Considered

Pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, a statement is involuntary and, therefore, inadmissible in court, if the accused was coerced into making it. Accordingly, a statement is not voluntary if it is:

1. the product of either physical or psychological coercion;
2. extracted by any sort of threat or violence;
3. the product of an assurance, express or implied, that a confession will aid the defense or result in a lighter sentence; or

4. made as the result of the exertion of any improper influence. Hutto v. Ross, 429 U.S. 28 (1976); Commonwealth v. Shine, 398 Mass. 641, 651-52 (1986). Commonwealth v. Raymond, 424 Mass. 382, 395 (1997).

In short, a statement may not be used in court if it was made in an environment so coercive as to support the conclusion that it was not freely and voluntarily given. Colorado v. Connelly, 479 U.S. 157 (1986); Edwards v. Arizona, 451 U.S. 477 (1981); Commonwealth v. Benjamin, 399 Mass. 220 (1987).

There is no hard and fast rule which can be applied under all circumstances to determine whether a suspect was coerced into making a statement. Rather, the totality of the circumstances of each statement, including the characteristics of the accused, must be considered to determine whether the will of the defendant was overborne such that the statement was not a free and voluntary act. Commonwealth v. Raymond, 424 Mass. 382, 395 (1997). See Mincey v. Arizona, 437 U.S. 385 (1978); Commonwealth v. Parker, 402 Mass. 333, 340 (1988); Commonwealth v. Williams, 388 Mass. 846, 851-52 (1983).

When evaluating whether a statement was coerced, a court will rarely base its decision on a single factor, such as the nature of the police conduct or the age of the accused. Rather, all the surrounding circumstances, including the individual factors discussed below, are scrutinized to determine whether physical or psychological pressures unduly influenced the accused to make the statement.

1. Age Of The Accused

Because juveniles are more susceptible than adults to coercive forces or intimidation, the circumstances surrounding their statements are more carefully scrutinized. Commonwealth v. MacNeill, 399 Mass. 71, 74 (1987); Commonwealth v. King, 17 Mass. App. Ct. 602, 609 (1984). Courts demand that police officers exercise considerable caution when questioning juveniles to ensure that coercive factors do not cause them to confess out of fear. For example, while the presence of several officers during the non-custodial questioning of an adult would not ordinarily be of concern, if a child is questioned by several officers he may feel so threatened that any statement would be deemed involuntary. Similarly, if a young child's parents are not present when he is questioned, his statement might not be voluntary if given under circumstances suggesting that he felt compelled to cooperate. Cf. Commonwealth v. Philip S., 414 Mass. 804, 811-814 (1993) (where a juvenile in custody is under the age of fourteen, police must not question the juvenile unless an interested adult is present, police must read Miranda warnings to both the juvenile and the adult, and the juvenile and adult must have an opportunity for consultation in order for the adult to explain the Miranda rights and consequences of a waiver to the juvenile). In Commonwealth v. Davis, the Supreme Judicial Court noted that the fact that the defendant was nineteen years old when he was questioned by the police was an important factor in their conclusion that his statements were voluntary. 403 Mass. 575, 579 (1988).

2. Experience

A child's or adult's history of contact with the police and the criminal justice system is relevant to determining whether his statements were voluntary. Someone who has a history of criminal activity and is familiar with police practices is less likely to feel threatened to the point of being coerced into speaking. Commonwealth v. Perrot, 407 Mass. 539, 543 (1990); Commonwealth v. Mandile, 397 Mass. 410, 413 (1986); Commonwealth v. King, 17 Mass. App. Ct. 602, 610 (1984).

3. Intelligence

Although persons with diminished mental capacity may waive their rights, they may be overly suggestible and subject to intimidation. Commonwealth v. Hartford, 425 Mass. 378, 380-381 (1997); Commonwealth v. Daniels, 366 Mass. 601, 606 (1975). Police officers should question this type of suspect as they do juveniles, exercising care to ensure that the interrogation is conducted in a non-coercive manner. Columbe v. Connecticut, 367 U.S. 568 (1961); Commonwealth v. Medeiros, 395 Mass. 336, 347 (1985); Commonwealth v. Williams, 388 Mass. 846, 852 (1983); Commonwealth v. Duffy, 36 Mass. App. Ct. 937, 938 (1994). In Commonwealth v. Davis, the defendant's "above average intelligence" supported the Court's ruling that his statements to the police were voluntary. 403 Mass. 575, 579 (1988).

4. Mental Illness

A person suffering from mental illness may lack the capacity to resist forces of suggestion and intimidation during questioning. Therefore, this type of person must be

questioned in the same non-coercive atmosphere as juveniles and persons of low intelligence. Fikes v. Alabama, 352 U.S. 191 (1957). Where a suspect appears normal, conveys information in a rational manner and states accurate facts, a court will conclude that the statement is voluntary despite the suspect's mental illness. Commonwealth v. Blanchette, 409 Mass. 99, 106-107 (1991); Commonwealth v. Felice, 44 Mass. App. Ct. 709, 710-711 (1998); see Commonwealth v. Wallen, 35 Mass. App. Ct. 915, 917 (1993) (despite the fact that the defendant appeared to have a mental illness, he appeared to understand his Miranda rights and voluntarily, knowingly, and intelligently waived them). A suspect who is emotionally distraught during custodial interrogation may be incapable of rendering a voluntary statement. See Commonwealth v. Magee, 423 Mass. 381, 387-388 (1996) (statements involuntary where suspect sobbing, shaking, and repeatedly asking for help from a mental health professional during interrogation).

5. Alcohol/Drugs

The fact that a statement is given while the speaker is under the influence of alcohol or drugs is relevant to an evaluation of its voluntariness. However, intoxication alone is not sufficient to negate an otherwise voluntary act. If the accused's mental status is significantly impaired by alcohol or drugs, he may be unduly susceptible to the coercive forces of police questioning. Commonwealth v. Bousquet, 407 Mass. 854, 861-62 (1990); Commonwealth v. Perrot, 407 Mass. 539, 542-43 (1990); Commonwealth v. Parker, 402 Mass. 333, 341 (1988); Commonwealth v. Meehan,

377 Mass. 552 (1979); Commonwealth v. Hosey, 368 Mass. 571 (1975); Commonwealth v. Doyle, 12 Mass. App. Ct. 786 (1981). Cf. Commonwealth v. Davidson, 27 Mass. App. Ct. 846, 850 (1989) (even if a high degree of intoxication prevents defendant from making voluntary statements, he may be capable of waiving his statutory rights to refuse breath and blood tests).

6. Tricks/Misrepresentations

The use of tricks or misrepresentations, including deliberate and false statements to the accused, to obtain a statement will often leave the court with no choice but to conclude that the statement was the product of coercive forces. Spano v. New York, 360 U.S. 315 (1959). But see Commonwealth v. Chandler, 29 Mass. App. Ct. 571, 577-78 (1990) (police have no obligation to correct suspect's false impressions), fur. app. rev. denied, 409 Mass. 1102 (1991). Examples of tricks and misrepresentations disapproved of in the past include:

- a) falsely telling the defendant that his girlfriend, a co-defendant, had made a statement implicating herself. Commonwealth v. Jackson, 377 Mass. 319 (1979). Contrast Commonwealth v. Dias, 405 Mass. 131, 140 (1989) (police did not engage in any misrepresentation or deceit in informing defendant that codefendant had implicated defendant in murder);
- b) falsely telling the defendant that his fingerprints were found at the scene of the crime. Oregon v. Mathiason, 429 U.S. 711 (1976);
- c) eliciting a statement by falsely telling the accused that his statement could not be used against him at trial. Commonwealth v. Dustin, 373 Mass. 612 (1977);
- d) the "Mutt and Jeff" routine whereby the accused is first questioned by a hostile interrogator and then

a supposedly sympathetic one. Miranda v. Arizona, 384 U.S. 436, 452 (1966); and

- e) falsely bolstering the strength of the case against the defendant. Commonwealth v. Meehan, 377 Mass. 552, 563 (1979).

Accordingly, police should avoid the use of false information or trickery in obtaining statements. But see Commonwealth v. Selby, 420 Mass. 656, 662-65 (1995); Commonwealth v. Edwards, 420 Mass. 666, 673-74 (1995); Commonwealth v. Felice, 44 Mass. App. Ct. 709, 712-713 (1998).

7. Promises

Any direct or implied promise to a suspect may exert so much influence on the accused that any subsequent statement will be deemed involuntary. Hutto v. Ross, 429 U.S. 28 (1976); Commonwealth v. Lahti, 398 Mass. 829 (1986); Commonwealth v. Luce, 34 Mass. App. Ct. 105, 111-112, fur. app. rev. denied, 414 Mass. 1105 (1993). For example, during questioning, a police officer must not promise that if the defendant cooperates he will be released, see Commonwealth v. Hunt, 12 Mass. App. Ct. 841 (1981), or promise that a confession will aid the defendant's defense or result in a lesser sentence. Commonwealth v. Mandile, 397 Mass. 410 (1986); Commonwealth v. Meehan, 377 Mass. 552 (1979).

However, so long as it is clear to the defendant that no promises are being made, a police officer may indicate to the defendant that his cooperation will be brought to the attention of the district attorney, or generally suggest that telling the truth could be beneficial to the defendant.

Commonwealth v. Souza, 428 Mass. 478, 481-482 (1998); Commonwealth v. Shine, 398 Mass. 641, 652 (1986); Commonwealth v. Mandile, 397 Mass. 410, 414 (1986). If such a statement is made to the accused, the police officer should explicitly inform the defendant that only the district attorney or the court, and not the police officer, has the final authority to drop charges or impose a lesser sentence in exchange for cooperation. See Commonwealth v. Chandler, 29 Mass. App. Ct. 571, 576-579 (1990) (where police officer truthfully advised suspect that the district attorney would not prosecute his brother for disposing of murder weapon, but failed to advise him that such a prosecution was impossible under G.L. c. 274, §4, there was no promise, "deal" or "trickery" inducing suspect's confession).

8. Threats

A statement made subsequent to a direct or implied threat of any nature will likely be deemed involuntary. Beecher v. Alabama, 389 U.S. 35 (1967); Lynumn v. Illinois, 372 U.S. 528 (1963).

9. Education/Proficiency in English

The fact that an accused has a minimal education should alert a police officer to the possibility that he may be more susceptible to coercion. Clewis v. Texas, 386 U.S. 707, 712 (1967). Conversely, courts have cited the fact that a defendant is well educated to support the conclusion that his will was not overborne by his interrogators. Crooker v. California, 357 U.S. 433 (1958); Commonwealth v. Davis, 403 Mass. 575, 579 (1988); Commonwealth v. Callahan,

401 Mass. 627, 629 n.3 (1988); Commonwealth v. Watkins, 33 Mass. App. Ct. 7, 16 (1992). The police must ensure that the suspect is either proficient in English, or if not, provide an interpreter, prior to commencing interrogation. However, the police do not have to provide an independent interpreter for a suspect not proficient in English; a police officer fluent in the suspect's language is sufficient. Commonwealth v. Ardon, 428 Mass. 496, 499-500 (1998).

10. Manner Of Interrogation

Some of the most blatant examples of coerced statements involve unacceptable physical treatment of suspects during questioning. Courts have had little difficulty in determining that confessions were not voluntarily given where the defendant was threatened, Haynes v. Washington, 373 U.S. 503 (1963); deprived of food, water or sleep, Brooks v. Florida, 389 U.S. 413 (1967); Reck v. Pate, 367 U.S. 433 (1961); or forced to remain naked during questioning. Commonwealth v. Collins, 11 Mass. App. Ct. 126 (1981). Conversely, courts have noted that providing food, water and bathroom privileges to a defendant during his interrogation tends to indicate that his statements were voluntary. Commonwealth v. Davis, 403 Mass. 575, 580 (1989).

11. Physical Condition/Emotional State Of Accused

An injured or ill suspect, or a suspect in a distraught emotional state, may be more susceptible to coercive forces during interrogation. For example, in Mincey v. Arizona, the Supreme Court concluded that the defendant was not

capable of giving a voluntary statement where he was questioned while hospitalized in a near coma and suffering unbearable pain. 437 U.S. 385 (1978). Likewise, in Commonwealth v. Magee, 423 Mass. 381, 387-388 (1996), the Supreme Judicial Court found the suspect's statements and her Miranda waiver not voluntary where she was emotionally distraught, disheveled, sobbing, shaking and repeatedly asking for the help of a mental health professional during a custodial interrogation. Cf. Commonwealth v. Freeman, 430 Mass. 111, 114-115 (1999) (although defendant appeared disheveled and dirty from hiding in woods for several days, statements were voluntary where he was articulate and aware of his circumstances and surroundings throughout questioning); Commonwealth v. Colon, 408 Mass. 419, 426 (1990) (defendant's complaints of headache and chest pains did not preclude the defendant from responding intelligently to questioning).

12. Informing Accused That He Is A Suspect

Police officers are not obligated to inform a suspect prior to questioning that he is suspected of a crime; nor are they obligated to inform a suspect of all the information useful in making a decision whether to speak to police. Colorado v. Spring, 479 U.S. 564, 576 (1987); Commonwealth v. Cunningham, 405 Mass. 646, 657 (1989); Commonwealth v. Chandler, 29 Mass. App. Ct. 571, 577-78 (1990). However, where the police elect to inform the suspect of their suspicions, a court may more readily

conclude that he appreciated the consequences of his cooperation and, therefore, that his statement was voluntarily given. Commonwealth v. Dias, 405 Mass. 131, 140 (1989); Commonwealth v. Amazeen, 375 Mass. 73, 78 (1978); Commonwealth v. Sires, 370 Mass. 541 (1976).

13. Advising Accused Of Miranda Rights

The Fifth Amendment does not require that police officers advise suspects of their Miranda rights in connection with non-custodial interrogations (see part II below). As such, a defendant cannot base his claim that his non-custodial statements were involuntarily given on the fact that he was not advised of his Miranda rights. However, advising a suspect who is not in custody of his rights is recommended because it indicates to the court that (i) the police were aware of the suspect's privilege against self-incrimination and were prepared to honor his rights, and (ii) the defendant was similarly aware that he had the right not to talk to the police. Commonwealth v. Parker, 402 Mass. 333, 339 n.2 (1988); Commonwealth v. Callahan, 401 Mass. 627, 629-30 (1988).

14. Defendant's Efforts To Protect Himself

When determining whether a suspect's statements to the police were voluntary, courts often consider the defendant's efforts during interrogation to protect himself. Commonwealth v. Roberts, 407 Mass. 731, 733 (1990); Commonwealth v. Davis, 403 Mass. 575, 581 (1988). For example, in Commonwealth v. Davis, the Court found that the

defendant's statements were voluntary, in part because the defendant was sufficiently rational to make exculpatory statements and refused to dictate an incriminating statement. 403 Mass. 575, 581 (1988). A suspect's efforts to protect himself prove to the court that the suspect appreciated the need to remain silent about information which would incriminate him; thus, false exculpatory statements are the result, not of police coercion, but of the suspect's own volition.

B. The Speaker Must Be Rational

The second prong of the voluntariness inquiry focuses on the mental condition of the speaker at the time the statement was given. To be voluntary under Massachusetts law, a statement must be the "product of a rational intellect". Commonwealth v. Callahan, 401 Mass. 627, 631 (1988); Commonwealth v. Johnston, 373 Mass. 21, 25 (1977). That is, at the time the statement was made, the speaker must have been capable of appreciating the consequences of his statement.

A statement is inadmissible in court if it would not have been made but for the fact that the speaker was irrational, see Commonwealth v. Louraine, 390 Mass. 28 (1983); Commonwealth v. Vasquez, 387 Mass. 96 (1982); whether by reason of severe mental illness, Commonwealth v. Vasquez, 387 Mass. 96 (1982); alcohol or drug intoxication, Commonwealth v. Meehan, 377 Mass. 552 (1979); Commonwealth v. Hosey, 368 Mass. 571 (1975); injury, Commonwealth v.

Benoit, 410 Mass 506 (1991); distraught emotional state, Commonwealth v. Magee, 423 Mass. 381, 383 (1996); or otherwise. Accordingly, a police officer should consider delaying an interrogation if the suspect does not appear calm, rational, and responsive to his surroundings and the police. Commonwealth v. Callahan, 401 Mass. 627, 630 (1988).

Whether an intoxicated suspect is capable of making statements which are the product of a rational intellect depends upon the degree of his intoxication. Commonwealth v. Pina, 430 Mass. 66, 71 (1999). Evidence of drug use or withdrawal alone does not render an otherwise valid confession involuntary. Commonwealth v. Nieves, 429 Mass. 763, 768-770 (1999). If the suspect's judgment does not seem impaired, Commonwealth v. Meehan, 377 Mass. 552, 566 (1979); and he remains capable of understanding questions and responding intelligently, Commonwealth v. Bousquet, 407 Mass. 854, 861-62 (1990); Commonwealth v. White, 374 Mass. 132, 138 (1977); a police officer need not consider delaying questioning. But, if the suspect's ability to freely choose whether to make a statement is undermined, Commonwealth v. Meehan, 377 Mass. 552, 563 (1979); or he appears "detached from reality," Commonwealth v. Hosey, 368 Mass. 571, 577 (1975); the suspect should not be questioned.

C. Statements To Private Citizens

On occasion a private citizen will tell the police that a defendant made a statement to the private citizen under circumstances indicating that it was not voluntarily made. Under Massachusetts law, involuntary statements to private citizens are also inadmissible. Commonwealth v. Blanchette, 409 Mass. 99, 106 (1991); Commonwealth v. Waters, 399 Mass. 708 (1987); Commonwealth v. Paszko, 391 Mass. 164 (1984). For example, in Commonwealth v. Mahnke, a statement was suppressed where a group of citizens abducted the defendant and extracted a confession of murder by subjecting him to prolonged questioning and rough treatment. Only after the defendant confessed was he turned over to the police. Commonwealth v. Mahnke, 368 Mass. 662 (1975). See also Commonwealth v. Carp, 47 Mass. App. Ct. 229, 232-234 (1999) (statements to D.S.S. investigator involuntary where defendant was "lulled into a false sense of security" by investigator's misrepresentations). In contrast, statements made by a law student accused of raping an undergraduate to a professor investigating the accusations on behalf of the university's disciplinary board, were voluntary where the law student was a well-educated, mature adult who made the statements with his counsel present. Commonwealth v. Watkins, 33 Mass. App. Ct. 7, 12-17 (1992). That the law student feared he might be expelled if he did not cooperate with the investigation because the board might credit his accuser's statement in the absence of hearing his side of

the story, did not make his statements involuntary. Id. at 16. See also Commonwealth v. Taylor, 426 Mass. 189, 195 (1997) (at police station, defendant's incriminating statement in response to a question from his sister was voluntary were there was no evidence of mental impairment or coercion).

D. Electronic Recording of Custodial Statements

In Commonwealth v. Diaz, 422 Mass. 269 (1996), the Supreme Judicial Court considered whether to institute a rule requiring that all interrogations at police stations be tape recorded. While the Court stopped short of requiring police officers to electronically record custodial interrogations at this time, it stated, "Police officials should be alert to the merits of recording custodial interrogations and be warned that the time may come when "recording in places of detention, at least, will be mandatory if a statement obtained during custodial interrogation is to be admissible." Id. In the interim, the Court invited defense counsel to pursue the failure to electronically record during cross-examination of a testifying police officer. Id. at 273; See also Commonwealth v. Ardon, 428 Mass. 496, 498 (1998). To assure the future admissibility of all interviews, police departments may wish to consider instituting a policy which requires their officers to consider, on a case by case basis, tape recording interviews with suspects at police

stations. A copy of a suggested policy may be obtained by contacting the Appeals & Training Bureau at 494-4062.

II. THE FIFTH AMENDMENT AND THE MIRANDA RIGHTS

The Fifth Amendment's provision that "no person . . . shall be compelled in any criminal case to be a witness against himself" is violated if someone is coerced into making a statement while in custody. Because suspects questioned while in police custody may feel more compelled than suspects not in custody to answer a police officer's questions, the Supreme Court in Miranda v. Arizona held that prior to custodial police questioning, a suspect must be advised of certain rights so as to inform him that he may refuse to cooperate with the police. If a police officer fails to advise a suspect of any right secured by Miranda, the suspect's statements will be inadmissible in court even if they were otherwise voluntary. Commonwealth v. Adams, 389 Mass. 265, 268-269 (1983); Commonwealth v. Ayala, 29 Mass. App. Ct. 592, 597-598 (1990).

A. The Miranda Rights

To protect a suspect's Fifth Amendment right not to incriminate himself, a police officer is required to advise a suspect prior to custodial interrogation that:

- a) he has the right to remain silent;
- b) anything he says can be used against him in a court of law;
- c) he has the right to have an attorney present during questioning; and

- d) if he cannot afford an attorney, one will be appointed for him prior to any questioning. Miranda v. Arizona, 384 U.S. 436 (1966).

Additionally, though not strictly one of the Miranda rights, a police officer should also inform a suspect of the so-called "fifth Miranda warning" that he has the right to stop the questioning at any time. Commonwealth v. Lewis, 374 Mass. 203, 205 (1978). See Commonwealth v. Roberts, 407 Mass. 731, 734 (1990) (to stop questioning after Miranda, defendant must expressly state his unwillingness to continue interview or affirmatively request an attorney). In Commonwealth v. Miranda, 37 Mass. App. Ct. 939, 940 (1994), the Court found the Miranda warnings were inadequate where the officer told the defendant he had a right to an attorney, but did not say that he had that right "prior to any questioning." The police need not ask a person who understands that he has a right to a lawyer if he actually wants a lawyer. Commonwealth v. Bui, 419 Mass. 392, 397 (1995).

Police officers are not required to inform a suspect of the nature of the crime about which he is to be interrogated, or the fact that he is considered a suspect. Commonwealth v. Raymond, 424 Mass. 382, 393 (1997). Commonwealth v. Medeiros, 395 Mass. 336, 345 (1985). See Commonwealth v. Ghee, 414 Mass. 313, 317 (1993); Commonwealth v. Chandler, 29 Mass. App. Ct. 571, 577-578 (1990). However, providing a suspect with this information may later suggest to a court that the suspect's statement

was voluntarily made, and may be a factor in determining whether the suspect made a knowing, intelligent, and voluntary waiver of his Miranda rights. Commonwealth v. Hooks, 38 Mass. App. Ct. 301, 304-305 (1995).

While the Miranda warnings may be given in either written or oral form, Commonwealth v. Day, 387 Mass. 915, 918 n.8 (1983), the better practice is to read the warning from a printed form and, whenever possible, to have the suspect both read and sign the form. The form should be retained for use at trial whether or not signed by the defendant. Commonwealth v. Howard, 4 Mass. App. Ct. 476 (1976). While there are no precise words required to convey the substance of the Miranda rights, California v. Prysock, 453 U.S. 355 (1981); Commonwealth v. Ghee, 414 Mass. 313, 318 (1993); Commonwealth v. Colon-Cruz, 408 Mass. 533, 539 (1990); police should read from the Miranda form whenever possible to avoid misleading a suspect or distorting the meaning of the warnings.

The Miranda warnings must be given prior to the commencement of custodial interrogation, and should be repeated:

- a) at regular intervals during a lengthy interrogation, Commonwealth v. Mello, 420 Mass. 375, 386 (1995) (where there is a significant lapse of time between initial Miranda warnings and inculpatory statements, the ultimate question is did the defendant, with a full knowledge of his legal rights, knowingly and intentionally relinquish them?);

- b) if the interrogation is interrupted for more than a short period of time, Commonwealth v. Doe, 37 Mass. App. Ct. 30, 34-35 (1994); or
- c) if police officers from another jurisdiction continue the interrogation. Commonwealth v. Silva, 388 Mass. 495 (1983).

But, police officers are not required to repeat the warnings simply because the focus of the interrogation shifts to a different crime. Commonwealth v. Medeiros, 395 Mass. 336, 345 (1985).

The Miranda requirement extends to custodial interrogation conducted by a person other than the police if the person is functioning as an instrument or agent of the police. Commonwealth v. A Juvenile, 402 Mass. 275, 278 (1988) (assistant director of juvenile detention facility required to give Miranda warnings when questioning juvenile on behalf of police). Cf. Commonwealth v. Snyder, 413 Mass. 521, 532 (1992) (high school official not required to give Miranda warnings prior to questioning student regarding drug possession, even if official intends to refer case to police).

B. Custody

Because Miranda warnings are required only when a person is subjected to custodial interrogation, it is important for police officers to be able to determine the moment at which a suspect is deemed to be in custody. A police officer may not question a suspect after this moment unless Miranda warnings are given. If the suspect does make inculpatory

statements in response to questioning without the benefit of Miranda, the court will suppress the statements at trial. Miranda v. Arizona, 384 U.S. 436 (1966); Commonwealth v. Magee, 423 Mass. 381, 385 (1996); Commonwealth v. Bryant, 390 Mass. 729 (1984). Indeed, extracting a statement from a suspect in custody without first providing Miranda warnings is so serious a violation that if police subsequently warn the suspect of his Miranda rights, the suspect's subsequent "warned" statements will, most likely, also be suppressed even though they were otherwise voluntary. Commonwealth v. Smith, 412 Mass. 823, 830-31, 836-37 (1992). Consequently, determining when a suspect is in custody is critical.

For purposes of the Fifth Amendment, "custody" is somewhat broader in scope than "arrest." Custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436 (1966). See Commonwealth v. Larkin, 429 Mass. 426, 432 (1999); Commonwealth v. Shine, 398 Mass. 641, 647 (1986); Commonwealth v. Haas, 373 Mass. 545, 551 (1977). Accordingly, Miranda warnings should be provided whenever a police officer intends to question a suspect who is under arrest or restrained to the degree associated with a formal arrest. California v. Behelar, 463 U.S. 1121 (1983). See Commonwealth v. Gordon, 47 Mass. App. Ct. 825, 827 (1999) (defendant in custody where handcuffed and placed in a

cruiser to be transported to crime scene for show-up). Miranda warnings do not have to be given during general, on-the-scene questioning, Commonwealth v. Tart, 408 Mass. 249, 258-59 (1990); Commonwealth v. McNelley, 28 Mass. App. Ct. 985, 986 (1990); at the scene of a traffic accident, Commonwealth v. Downs, 31 Mass. App. Ct. 467, 471 (1991); during a threshold inquiry (stop and frisk), Miranda v. Arizona, 384 U.S. 436 (1966); Commonwealth v. Shine, 398 Mass. 641 (1986); Commonwealth v. Mebane, 33 Mass. App. Ct. 941, 943 (1992), or prior to questioning a motorist during an ordinary traffic stop. Berkemer v. McCarty, 468 U.S. 420 (1984); Pennsylvania v. Bruder, 109 S.Ct. 205, 207 (1988); Commonwealth v. Ayre, 31 Mass. App. Ct. 17, 20 (1991). The fact that questioning may lead to virtually simultaneous conclusions by the police that a crime has been committed and that the individual being questioned is its perpetrator, does not make the interrogation custodial. Commonwealth v. Merritt, 14 Mass. App. Ct. 601, 605 (1982).

In Pennsylvania v. Bruder, the Supreme Court held that a police officer was not obligated to provide Miranda warnings when he questioned a motorist about his alcohol ingestion. Although the police officer had stopped the suspect's car and administered field sobriety tests prior to inquiring about alcohol, the Court concluded that the motorist was not in custody. 109 S.Ct. 205, 207 (1988). See Vanhouton v. Commonwealth, 424 Mass. 327, 330-333 (1997) (police are not required to furnish Miranda warnings before administering

field sobriety tests); Commonwealth v. Cameron, 44 Mass. App. Ct. 912, 914 (1998) (no Miranda warning required during temporary detention, questioning, and administering of field sobriety tests); Commonwealth v. Cameron, 44 Mass. App. Ct. 912, 914 (1998) (no Miranda warnings required during temporary detention, questioning, and administering of field sobriety tests); Commonwealth v. Smith, 35 Mass. App. Ct. 655, 657-658 (1993) (defendant not in custody even though police stopped him in vicinity of fatal hit & run and questioned him regarding his substantial front end damage ten minutes after accident).

The determination of the moment at which a suspect is deemed to be in custody is based on an objective standard and does not depend on the subjective beliefs of the police officer or the suspect. Commonwealth v. Larkin, 429 Mass. 426, 432 (1999). Furthermore, a noncustodial atmosphere may develop into a custodial one during the course of interrogation. Commonwealth v. Osachuck, 418 Mass. 229, 232-233 (1994). A suspect is in custody if a reasonable person facing the same facts and circumstances would believe that he is in custody. Commonwealth v. Buckley, 410 Mass. 209, 216 (1991); Commonwealth v. Tart, 408 Mass. 249, 258 (1990); Commonwealth v. A Juvenile, 402 Mass. 275, 277 (1988); Commonwealth v. Corriveau, 396 Mass. 319, 327 (1985); Commonwealth v. Bryant, 390 Mass. 729, 736-37 (1984).

A variety of factors are relevant to determining whether a reasonable person who is not under formal arrest would nonetheless believe he is in custody for purposes of the Fifth Amendment. These include:

1. The place of interrogation.

The place of interrogation is an important factor used in determining whether a reasonable person believes he is in custody. See Commonwealth v. Larkin, 429 Mass. 426, 427-428 (1999) (defendant questioned about murder while being held at house of correction on an outstanding probation surrender warrant); Commonwealth v. A Juvenile, 402 Mass. 275, 277 (1988) (juvenile questioned in D.S.S. detention facility); Commonwealth v. Bryant, 390 Mass. 729 (1984) (defendant questioned at home); Commonwealth v. Gallati, 40 Mass. App. Ct. 111, 112-113 (1996) (Miranda warnings required where suspect, a corrections officer, questioned in superintendent's office behind locked doors). Because a neutral setting suggests that the suspect is not in custody, a police officer should be more cautious about questioning a suspect without first giving Miranda warnings in the police station rather than in the suspect's home, Beckwith v. United States, 425 U.S. 341, 348 (1976); Commonwealth v. Harris, 387 Mass. 758, 765 (1982); Commonwealth v. King, 33 Mass. App. Ct. 905, 906 (1992); place of business, Commonwealth v. Tart, 408 Mass. 249, 258 (1990); Commonwealth v. Accaputo, 380 Mass. 435, 452 (1980); parking lot, Commonwealth v. Downs, 31 Mass. App. Ct. 467, 471

(1991); or some other public place. Pennsylvania v. Bruder, 109 S.Ct. 205, 207 (1988); Commonwealth v. McNelley, 28 Mass. App. Ct. 985, 986 (1990).

However, interrogation is not custodial simply because it takes place in a setting such as a police station. A suspect who voluntarily comes to the police station may be questioned without Miranda warnings if he understands that he is free to leave at any time. California v. Behelar, 463 U.S. 1121 (1983); Commonwealth v. Jung, 420 Mass. 675, 688 (1995); Commonwealth v. Buckley, 410 Mass. 209, 217 (1991); Commonwealth v. Parker, 402 Mass. 333, 339 (1988); Commonwealth v. Cruz, 373 Mass. 676, 682-83 (1977); Commonwealth v. Wallen, 35 Mass. App. Ct. 915, 916-917 (1993). Nor is a person in custody "simply because he complied with a request by the police that he accompany them to the station for questioning." Commonwealth v. Azar, 32 Mass. App. Ct. 290, 297 (1992). See also Commonwealth v. Sim, 39 Mass. App. Ct. 212, 220-21 (1995) (defendant not in custody where he came willingly to police station, was allowed to roam about, knew he was free to leave, and the questioning was not overly aggressive); Commonwealth v. Greenberg, 34 Mass. App. Ct. 197, 201 (1993) (defendant not in custody where he travelled to and from the police station with his father in their own car).

2. Whether the investigation has begun to focus on the defendant, including whether there is probable cause to arrest the defendant.

The fact that a police officer has not focused his suspicions on the person being questioned suggests that the person is not in custody. California v. Behelar, 463 U.S. 1121 (1983); Commonwealth v. Taylor, 426 Mass. 189, 194 (1997); Commonwealth v. Gil, 393 Mass. 204, 212-13 (1984); Commonwealth v. Greenberg, 34 Mass. App. Ct. 197, 201 (1993). However, focus alone is not determinative. Commonwealth v. Phinney, 416 Mass. 364, 370 (1993); Commonwealth v. Valliere, 366 Mass. 479, 486 (1974). A Police officer's undisclosed belief that the person being questioned is a suspect does not bear upon the question of whether he is in custody for Miranda purposes. Stansbury v. California, 511 U.S. 318, 324 (1994); Commonwealth v. Morse, 427 Mass. 117, 124-127 (1998).

3. The nature of the interrogation, including whether the interview was aggressive or informal.

The nature of the interrogation is another important factor used in determining whether an individual is in custody. Commonwealth v. Bryant, 390 Mass. 729 (1984); Commonwealth v. Gallati, 40 Mass. App. Ct. 111, 113-114 (1996) (interrogation formal, domineering, and relentless). A person questioned by numerous officers in a threatening manner may reasonably conclude that he is in custody, Orozco

v. Texas, 394 U.S. 324 (1969), while a person may not reasonably conclude that he is in custody when questioned in an informal atmosphere by a single police officer. Pennsylvania v. Bruder, 109 S.Ct. 205, 207 (1988); Commonwealth v. Healy, 393 Mass. 367, 374 (1984); Commonwealth v. Gil, 393 Mass. 204, 213 (1984); Commonwealth v. Greenberg, 34 Mass. App. Ct. 197, 201 (1993); Commonwealth v. King, 33 Mass. App. Ct. 905, 906 (1992). See also Commonwealth v. Osachuck, 418 Mass. 229, 233 (1994) (questioning began nonaggressively but turned hostile).

4. Whether the suspect believed he was free to terminate the questioning and leave the area.

A court is not likely to conclude that a defendant was subjected to custodial interrogation if the defendant believed that he was free to end the questioning and leave the area. Minnesota v. Murphy, 465 U.S. 420 (1984); Commonwealth v. Phinney, 416 Mass. 364, 370-371 (1993); Commonwealth v. Buckley, 410 Mass. 209, 217 (1991); Commonwealth v. Bryant, 390 Mass. 729, 737 (1984); Commonwealth v. Gil, 393 Mass. 204, 212 (1984); Commonwealth v. King, 33 Mass. App. Ct. 905, 906 (1992). See Commonwealth v. Larkin, 429 Mass. 426, 435 (1999) (the defendant, who was being held in house of correction on a probation surrender warrant, was not in "custody" for Miranda purposes, because he was free to decline to speak with the officers, free to terminate the interview at any

time, free to leave the interview area, and he was not physically restrained).

5. The duration of the detention.

A prolonged detention suggests that the defendant was in custody rather than merely subject to a threshold inquiry. See United States v. Lee, 699 F.2d 466, 468 (9th Cir. 1982); United States v. Chamberlain, 644 F.2d 1262, 1266-67 (9th Cir. 1980).

Additionally, any person under formal arrest is in custody for purposes of the Fifth Amendment. (For a comprehensive discussion of the law of arrest, please see the section of this manual entitled, "The Law of Arrest").

C. Interrogation

A suspect must be told his Miranda rights only if he is going to be interrogated while in custody. Miranda v. Arizona, 384 U.S. 436 (1966). Interrogation includes express questioning and all words or actions that a reasonable police officer would know are reasonably likely to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291, 301 (1980); Commonwealth v. Morse, 427 Mass. 117, 122-128 (1998). See Commonwealth v. Torres, 424 Mass. 792, 796-798 (1997) (interrogation defined as direct questioning or its functional equivalent; test for "functional equivalence" is whether reasonable person would view police statements and conduct as interrogation). Commonwealth v. Doucette, 391 Mass. 443, 449 (1984); Commonwealth v. Mitchell, 47 Mass. App. Ct. 178, 180-181

(1999); Commonwealth v. Rubio, 27 Mass. App. Ct. 506, 512 (1989). Spontaneous and unsolicited statements are not the product of interrogation. Commonwealth v. Chipman, 418 Mass. 262, 272-273 (1994); Commonwealth v. Smith, 35 Mass. App. Ct. 655, 657 (1993); Commonwealth v. Mitchell, 35 Mass. App. Ct. 909, 910-11 (1993).

Any conduct which is likely to cause a suspect to make an incriminating statement will constitute interrogation and, therefore, must be preceded by the Miranda warnings. Examples of such conduct held to require Miranda warnings include:

1. In Rhode Island v. Innis, after police officers were unable to locate the gun used in a murder, one officer commented to another officer in the defendant's presence that he was concerned that a child would find the gun and injure himself. The defendant responded by leading the police to the gun. 446 U.S. 291 (1980).
2. In Brewer v. Williams, after police officers were unable to locate the murder victim's body, an officer told the mentally ill, deeply religious suspect that the victim deserved a Christian burial. The suspect responded by revealing the location of the body. 430 U.S. 387 (1977).
3. In Commonwealth v. Brant, the defendant gave a statement to the police only after being told that a co-defendant had made a full confession implicating both the defendant and the co-defendant. 380 Mass. 876 (1980).
4. In Commonwealth v. Rubio, police officers located cocaine in the defendant's apartment while executing a search warrant. After arresting the defendant, but before reading him his Miranda rights, an officer showed the defendant cocaine found in a pocketbook. The defendant stated, "It's mine. My girlfriend . . . had nothing to do with it." Even though the defendant was not asked any questions, his admission was suppressed because the act of showing the cocaine to the defendant was the functional equivalent of

questioning him about it. 27 Mass. App. Ct. 506 (1989).

5. In Commonwealth v. Sheriff, 425 Mass. 186, 199 (1997), officers gave Miranda warnings to a defendant when he first regained consciousness in a hospital, but he was unable to answer any questions at that time due to his injuries. The officers returned to the hospital at a later time and, prior to informing him of his Miranda rights, asked the defendant whether he recognized them from their earlier visit. Under the particular circumstances of that case, because the police officers may have been aware of the possibility of an insanity defense (the defendant had a prior psychiatric history), the Court questioned whether the officer's words amounted to an interrogation requiring Miranda warnings. The Court added that in the event of a retrial, a hearing should be held to determine whether the police asked the questions in order to obtain incriminating evidence that the defendant was oriented to person, place, and time, shortly after the murder.

Miranda warnings do not have to be given prior to asking questions normally attendant to police arrest and custody procedures. Pennsylvania v. Muniz, 110 S. Ct. 2638, 2647-50 (1990); Rhode Island v. Innis, 446 U.S. 291 (1980); Commonwealth v. Guerrero, 32 Mass. App. Ct. 263, 267-68 (1992); Commonwealth v. Kacavich, 28 Mass. App. Ct. 941, 941-42 (1990). As standard booking information, a police officer may ask a person under arrest basic biographical questions - name, age, address, next of kin, weight, height, eye color, and other standard booking questions not reasonably likely to elicit incriminating responses. Muniz, 110 S. Ct. at 2647-2650. See Commonwealth v. White, 422 Mass. 487, 500-503 (1996) (police could not reasonably have known that phone number called by arrestee in exercising his

statutory telephone rights would lead to incriminating evidence).

Although questions relating to employment are often included in booking, the courts have held that such questions have "obvious potential to incriminate," especially where the possession of cash and the lack of employment are linked to drug dealing. As a result, "where an arrestee's employment status may prove incriminatory, the police must give Miranda warnings before asking questions about employment." Commonwealth v. Woods, 419 Mass. 366, 372 (1995). See Commonwealth v. Guerrero, 32 Mass. App. Ct. at 267-268 (1992).

Much like booking questions, police may ask a suspect whether he wishes to take a breathalyzer test or make a phone call. South Dakota v. Neville, 459 U.S. 533 (1983). See Commonwealth v. Brazelton, 404 Mass. 783, 785 (1989) (neither art. 12 nor due process requires that a defendant be given an opportunity to consult with an attorney before deciding whether to submit to a breath test); Commonwealth v. Mencoboni, 28 Mass. App. Ct. 504, 505-506 (1990).

D. Waiver Of Miranda Rights

A police officer may conduct a custodial interrogation only if the suspect first executes a voluntary, knowing and intelligent waiver of his Fifth Amendment rights. Miranda v. Arizona, 384 U.S. 436 (1966); Commonwealth v. Corriveau, 396 Mass. 319 (1985). When a suspect executes a voluntary, knowing, and intelligent waiver, it is not

improper for police to attempt, within proper bounds, to elicit a voluntary confession from the suspect. See Commonwealth v. MacKenzie, 413 Mass. 498, 513 (1992). For example, where a suspect executed an effective waiver of his Fifth Amendment right to remain silent, it was not improper for police to intentionally escort the suspect past his accomplice, who was also in custody at the police station. Id.

While the waiver may be explicit or implied, the police officer should bear in mind that the Commonwealth bears the burden by proof beyond a reasonable doubt of showing that the waiver was voluntarily, knowingly and intelligently given. Commonwealth v. Pucillo, 427 Mass. 108, 110 (1998). Commonwealth v. Day, 387 Mass. 915, 921 (1983). Accordingly, an express waiver is the preferable form of waiver. See United States v. Budzyna, 666 F.2d 666 (1st Cir. 1982). To constitute an express waiver, the suspect must state that he understands his rights and is willing to talk to the police. Whenever possible, an express waiver should be executed in writing. The writing should include the Miranda warnings and be followed by a statement that the defendant has read the waiver form, understands the rights, and is willing to talk to the police.

In the absence of an express waiver, a waiver may be implied from the suspect's words and actions. Commonwealth v. Aarhus, 387 Mass. 735 (1982). An implied waiver may be found where:

- (i) the defendant does not expressly indicate that he understands his rights, but states that he is willing to talk after being given Miranda warnings. Commonwealth v. Aarhus, 387 Mass. 735 (1982);
- (ii) the defendant states only that he understands his rights, but thereafter talks to the police. Commonwealth v. Corriveau, 396 Mass. 319 (1985); or
- (iii) the defendant commences to make a statement without stating that he understands his rights or wishes to talk to the police. North Carolina v. Butler, 441 U.S. 369 (1979); Commonwealth v. Silva, 388 Mass. 495 (1983).

1. Waiver Must Be Voluntary

The same standard applies to the voluntariness of a waiver as to the voluntariness of a statement. Commonwealth v. Tevenal, 401 Mass. 225, 226 n.1 (1987); Commonwealth v. Garcia, 379 Mass. 422, 428 (1980). Accordingly, please review the voluntariness discussion contained in Section I of this Article.

2. Waiver Must Be Knowing And Intelligent

It is possible for a waiver to be voluntary -- that is, not the product of coercion -- but not knowing and intelligent. Edwards v. Arizona, 451 U.S. 477 (1981). When conducting a post-arrest interrogation, bear in mind that the Commonwealth has the burden of showing a knowing and intelligent waiver by proof beyond a reasonable doubt. Commonwealth v. Day, 387 Mass. 915, 921 (1983). Therefore, questioning should not commence until the police officer conducting the interview is satisfied that the accused understands the Miranda warnings.

If the suspect makes a statement after being advised of his Miranda warnings, the Commonwealth bears the burden of proving that he understood the warnings. Commonwealth v. Day, 387 Mass. 915 (1983). That is, the Commonwealth must show that the suspect knowingly and intelligently waived his rights. Accordingly, after giving the warnings police officers should immediately ask the suspect if he understands them.

Police officers should be alert to the presence of factors which might later weigh against a court's finding of a knowing and intelligent waiver (many of these factors are more fully discussed at Section I of this article in the context of voluntariness). For example, a suspect may not adequately understand his Fifth Amendment rights where:

- (i) his command of the English language is poor;
- (ii) he is under the influence of alcohol or drugs;
- (iii) he has a diminished mental capacity; or
- (iv) he suffers from mental illness.

If any of these factors are present, police officers should take extra care to make certain that the warnings were understood.

Conversely, factors such as a history of criminal activity and involvement with the police, or obvious intelligence and advanced education, weigh in favor of concluding that a waiver is knowing and intelligent.

While the Fifth Amendment does not require a police officer to notify a suspect of his attorney's efforts to

contact him, see Moran v. Burbine, 475 U.S. 412 (1986), the Supreme Judicial Court has not yet decided whether article 12 of the Massachusetts Declaration of Rights requires that a suspect be advised of his attorney's efforts to contact him in order to make a knowing and intelligent waiver of his Miranda rights. Commonwealth v. Cryer, 426 Mass. 562, 567-568 (1998). See also Commonwealth v. Sherman, 389 Mass. 287, 296 (1983) and Commonwealth v. McKenna, 355 Mass. 313, 324 (1969) (both of which were decided on Fifth Amendment grounds).

Accordingly, a police officer should not question a suspect once his attorney has asked to see him until: (i) the attorney and suspect have consulted and the suspect waives his right to remain silent, or (ii) the suspect waives his Miranda rights with full knowledge that his attorney wishes to see him. Commonwealth v. Currie, 388 Mass. 776, 781-783 (1983).

However, if an attorney calls the police while they are questioning the defendant and the attorney does not a) ask about his client's whereabouts, b) state that he is representing the defendant, or c) demand to be present when his client is questioned, then the police need not inform the attorney that they are questioning the defendant and need not inform the defendant that the attorney has called. Commonwealth v. Phinney, 416 Mass. 364, 371-372 (1993).

If a suspect indicates that he does not understand the warnings, the police officer should reread the warnings to

the suspect in their entirety -- do not reread only a segment of the warnings, change the wording or attempt to explain their meaning.¹

If the suspect does not understand the warnings after a second reading, he should not be interrogated until he has consulted an attorney.

Finally, a defendant's waiver after receiving incomplete or defective Miranda warnings may not be valid even though he had received proper and complete warnings prior to the defective ones. Commonwealth v. Coplin, 34 Mass. App. Ct. 478, 481-483 (1993). For example, in Commonwealth v. Coplin, the police recited the complete Miranda warning to the defendant at the time he was placed under arrest, ordered to lie on the floor, and handcuffed. At that time, the defendant did not show that he understood the rights or that he waived them. At the station, officers twice recited the Miranda warning but each time omitted the warning that anything the defendant said could be used against him in a court of law. Because the defendant never showed that he understood and waived his rights when read to him at arrest,

¹ In Commonwealth v. Grenier, the Supreme Judicial Court held that a police officer's response to the defendant's request for an explanation of the statement "that anything he might say may be used against him" neither was erroneous nor amounted to trickery or deception, where the officer explained to the defendant that "what we wanted was to get a statement to the best of his knowledge [sic] of his day's activities. That anything that he tells us, which will be recorded and signed by him, at some future date can be used in court. Somebody would testify in court if, in fact, we go to court." Grenier, 415 Mass. at 683-684.

the Appeals Court concluded that the initial reading could not be carried over to the interrogation at the station to cure the defective warnings. Consequently, the defendant's statement made after the defective warnings was not the result of a voluntary and intelligent waiver of his rights.

E. Invoking Miranda Rights

If a suspect invokes his Fifth Amendment right to remain silent or to have an attorney present during interrogation, all questioning must immediately cease. Moran v. Burbine, 475 U.S. 412 (1986); Miranda v. Arizona, 384 U.S. 436, 474 (1966); Commonwealth v. Corriveau, 396 Mass. 319, 331 (1985). Miranda rights may be invoked in several ways. The accused may (i) state that he wishes to remain silent or stop answering questions, (ii) request the presence of an attorney, or (iii) indicate by actions or words an unwillingness to continue with the interrogation. See Commonwealth v. Hussey, 410 Mass. 664, 671 (1991); Commonwealth v. Ewing, 30 Mass. App. Ct. 285, 287 (1991) (Miranda rights invoked by either expressed unwillingness to continue or affirmative request for attorney); Commonwealth v. King, 34 Mass. App. Ct. 466, 468, fur. app. rev. denied, 415 Mass. 1106 (1993) (defendant invoked right to remain silent when he told police "you're a bunch of [f . . 'ing * * * *] and I don't want to talk no more.)." Compare Commonwealth v. Raymond, 424 Mass. 382, 393-394 (1997) (suspect did not invoke right to remain silent when he denied any involvement in the murder, crossed his arms,

remained silent and shook his head in response to the officer's questions); Commonwealth v. Costa, 414 Mass. 618, 626-627 n.5 (1993) (defendant did not invoke right to remain silent when he told police he had "no recollection" of his activities, "he didn't want to be a canary" or "squeal" on his friends); Commonwealth v. Selby, 420 Mass. 656, 661 (1995) (defendant did not invoke right to remain silent where at the end of a tape recorded statement the officer asked if there's "anything else you'd like to add" and the defendant responded "No"). However invoked, a police interrogator must scrupulously honor an accused's right to remain silent or have an attorney present during questioning. Michigan v. Mosley, 423 U.S. 96, 103-104 (1975); Miranda v. Arizona, 384 U.S. 436, 474, 479 (1966).

Once a defendant has invoked his right to remain silent (as opposed to his right to have an attorney present during questioning), questioning may be resumed at a later time under certain conditions. A police officer may initiate further questioning where:

- (i) the person's right to terminate questioning was scrupulously honored when first exercised; and
- (ii) a significant amount of time has lapsed since questioning was ceased -- two hours is sufficient -- Michigan v. Mosley, 423 U.S. 96 (1975); but fourteen minutes is not, Commonwealth v. Brant, 380 Mass. 876 (1980); and
- (iii) the accused is again advised of his Miranda rights; and
- (iv) the renewed questioning does not concern the same crime for which the suspect was

originally interrogated. Arizona v. Roberson, 108 S.Ct. 2093 (1988); Michigan v. Mosley, 423 U.S. 96 (1975).

Only the defendant may initiate further questioning with respect to the same crime for which he earlier exercised his right to remain silent. Commonwealth v. Richmond, 379 Mass. 557, 560 (1980); Commonwealth v. Watkins, 375 Mass. 472, 484 (1978). To initiate further questioning, the defendant, without encouragement from a police officer, must clearly express his desire to make a statement. If the defendant indicates a desire to continue the questioning or to make a statement, it is strongly recommended that the Miranda warnings be reread to the defendant. See Commonwealth v. Orton, 4 Mass. App. Ct. 593, 596 (1976).

If a defendant invokes his Fifth Amendment rights by asking that an attorney be present during questioning, a police officer may not initiate further questioning with respect to the same crime or a different crime unless the request for an attorney is honored. See Commonwealth v. Chadwick, 40 Mass. App. Ct. 425, 426-28 (1996) (where police officer's comment on the definition of rape impermissibly elicited an incriminating response from the defendant after he invoked his right to counsel); Commonwealth v. DiMuro, 28 Mass. App. Ct. 223, 226-228 (1990) (where defendant made an ambiguous assertion that he wished to have counsel present during questioning, before questioning the defendant, officers should have found out specifically whether he wanted his counsel present). Until that time only the

accused may initiate further questioning. Minnick v. Mississippi, 111 S.Ct. 486, 489-490 (1990); Arizona v. Roberson, 108 S.Ct. 2093 (1988); Michigan v. Jackson, 475 U.S. 625 (1986); Edwards v. Arizona, 451 U.S. 477 (1981). See Commonwealth v. D'Entremont, 36 Mass. App. Ct. 474, 478-480 (1994) (court held that defendant initiated questioning, even though detective had first approached him and said that she would be willing to talk to him if he changed his mind). If a suspect invokes his right to counsel, police should not initiate any further questioning unless the suspect has counsel present even if the suspect has remained in custody as long as six months after first invoking his right to counsel. Commonwealth v. Perez, 411 Mass. 249, 256-59 (1991). If, however, the suspect is released from custody, the suspect's Fifth Amendment right to counsel ends. Commonwealth v. Galford, 413 Mass. 364, 368-71 (1992). Therefore, if police subsequently take the suspect back into custody, the police should advise the suspect of his Miranda rights and may initiate questioning unless the suspect invokes his right to counsel anew. Id. Of course, the break in custody should not be contrived to elicit a statement in the absence of counsel. See id. at 370 n. 9.

F. Waivers By Juveniles

Before a juvenile's custodial statements may be used against him in court, the Commonwealth must show that the police officers who interrogated the child followed specific

procedures established to ensure that his Miranda rights were voluntarily, intelligently and knowingly waived.

1. Children Under the Age of Fourteen

A child under fourteen years of age is always deemed to be incapable of executing a voluntary, knowing and intelligent waiver of his Miranda rights in the absence of a parent or interested adult. Commonwealth v. Berry, 410 Mass. 31, 34-35 (1991); Commonwealth v. A Juvenile (No. 1), 389 Mass. 128 (1983). Accordingly, a child under the age of fourteen must not be questioned unless a parent or interested adult is present and participates in the child's decision to waive his rights. Commonwealth v. Phillips, 414 Mass. 804, 810-811 (1993). In determining whether the parent or adult is "interested," police should look to see if the objective facts before them indicate that the adult has the capacity to appreciate the juvenile's situation, to give advice and is willing to assist the child in the choices the child must make. Id. at 809. The fact that the adult tells the child to "tell the truth" rather than advise the child to remain silent or seek immediate legal assistance, does not automatically make the adult disinterested in the child. Id.; Commonwealth v. McCra, 427 Mass. 564, 567 (1998).

Once the police are satisfied that an interested adult is present, they must read the Miranda rights to both the child and the adult. Berry, 410 Mass. at 35. The officer should ask both the child and the adult if they understand

the rights, preferably after reciting each right. Phillip S., 414 Mass. at 806. Once both adult and child indicate that they understand the rights, the police should afford the two an opportunity to consult and discuss the rights. Id. at 811-813. Actual consultation is not necessary, nor is it necessary for the police to force the adult to speak with the child, nor can the police dictate the content of the discussion Id. at 812 & n.6. [The preferred practice with any juvenile is for the police to explicitly inform the juvenile's parent, or other interested adult, that an opportunity is being furnished for the two to confer about the juvenile's rights. Id.]

Once the police have followed these steps, questioning is permitted only if both the child and the adult indicate that they understand the rights and the child expressly waives them. Commonwealth v. Day, 387 Mass. 915 (1983); Commonwealth v. Tavares, 385 Mass. 140 (1982). But, even where these procedures are followed, it may still be difficult to prove at trial that the child, rather than just the adult, understood the warnings.

2. Children Over the Age of Fourteen

With respect to juveniles who have attained the age of fourteen, police officers are strongly urged to conduct custodial interrogation only where a parent or interested adult is present, understands the Miranda rights, and is afforded the opportunity to consult with the juvenile. Commonwealth v. Tevenal, 401 Mass. 225, 227 (1987).

Commonwealth v. Ferrer, 47 Mass. App. Ct. 645, 647 (1999). In Commonwealth v. McCra, supra, 427 Mass. at 568, the defendant was being questioned about the murder of his parents. His aunt acted as an interested adult during the interrogation. The court found that the aunt, despite her close relationship to the victims, could serve as an interested adult. A minor, however, cannot qualify as an "interested adult" to satisfy this requirement. Commonwealth v. Guyton, 405 Mass. 497, 502 (1989) (suspect's seventeen year old sister, by reason of her own presumed lack of maturity, is not qualified to advise suspect whether to waive Miranda safeguards).

If a parent or interested adult is not available after reasonable efforts are made to contact them, police may take a statement from a child who has attained the age of fourteen if the child is sufficiently intelligent, experienced, knowledgeable and sophisticated to understand his Miranda rights without consulting a parent or interested adult. Commonwealth v. MacNeill, 399 Mass. 71 (1987); Commonwealth v. King, 17 Mass. App. Ct. 602, 610-611 (1984). In any event, it is the Commonwealth's burden to show that the child (and not the parent or interested adult) understands and waives the Miranda rights. Commonwealth v. Berry, supra, 410 Mass. at 35 ("The ultimate question is whether the juvenile has understood his rights and the potential consequences of waiving them before talking to police.")

G. Public Safety Exception

In New York v. Quarles, the Supreme Court held that the Miranda warnings do not have to be given if a suspect's refusal to answer questions may pose an immediate risk to public safety. New York v. Quarles, 467 U.S. 649 (1984). In Quarles, a police officer took the defendant into custody in a supermarket following a rape. When the officer frisked the defendant and found an empty shoulder holster, he asked the defendant where the gun was without giving the Miranda warnings. The defendant answered, "the gun is over there." Under these facts, the Supreme Court held that the officer's fear that either an accomplice or bystander would find the gun and injure someone justified dispensing with the Miranda warnings. See also Commonwealth v. Kitchings, 40 Mass. App. Ct. 591, 597-98 (1996) (officer's forceful inquiry as to the whereabouts of "the gun" whose clip he saw in the vehicle was appropriate under public safety exception).

Police officers should be reluctant to rely on the "public-safety exception" until either the Supreme Court or the Supreme Judicial Court more clearly define the circumstances under which it may be invoked. See Commonwealth v. Bourgeois, 404 Mass. 61, 66 (1989) (leaving undecided whether the exception could be invoked in a situation where the safety of the police, rather than the public generally was threatened). Until then, Miranda warnings should be given unless the suspect's refusal to

cooperate would pose an immediate and serious risk to the officer's or the public's safety.

H. Consequences of Fifth Amendment Violations

Of course, if police conduct a custodial interrogation of a suspect without warning the suspect of his Miranda rights, the court will suppress the statement. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

Likewise, if a suspect's statement is the result of a Miranda violation, evidence or a witness discovered as a result of the statement may also be suppressed. Unless the taint of the violation is sufficiently attenuated, evidence flowing from the original violation is inadmissible. Commonwealth v. Torres, 424 Mass. 792, 799 (1997); Commonwealth v. Damiano, 422 Mass. 10, 13 (1996); Commonwealth v. Osachuck, 418 Mass. 228, 236 (1994); Commonwealth v. Gallant, 381 Mass. 465, 468-71 (1980). For example, if the statement was the sole source of probable cause to secure a search warrant, evidence seized pursuant to the warrant will be suppressed. Commonwealth v. White, 374 Mass. 132, 138-139 (1977).

If the suspect's statement discloses the identity of a witness previously unknown to the police, the witness's testimony may also be suppressed. See Lahti, 398 Mass. at 836 (victim's testimony suppressed where suspect disclosed victim's identity as a result of involuntary statement to police); Commonwealth v. Gallant, 381 Mass. 465, 468-71 (1980) (codefendant's statement to police not suppressed

where police knew of codefendant's involvement in crime before obtaining defendant's statement identifying codefendant in violation of Miranda).²

Suppression is also a likely result if police obtain custodial statements from a suspect without warning him of his Miranda rights, they subsequently administer the warnings while the suspect is still in custody, and then they continue to extract statements from the suspect. Not only will the "unwarned" statements be suppressed but the "warned" statements will also be suppressed, even though they are otherwise voluntary, because the unwarned statements are presumed to taint the later warned statements. Commonwealth v. Osachuck, 418 Mass. 228, 236 (1994); Commonwealth v. Smith, 412 Mass. 823, 830-31, 836-37 (1992).

The Commonwealth can overcome this presumption of taint (making the later, warned statements admissible) if (1) police create a "break in the stream of events" between the unwarned and warned statements such that the police eliminate the coercive circumstances which extracted the unwarned statements or (2) the suspect's unwarned statements were not incriminating such that they did not lead the suspect to believe falsely that the "cat was out of the bag" or that his unwarned statements had already sealed his fate.

² But see Michigan v. Tucker, 417 U.S. 433, 450 (1974) (witness's testimony not suppressed although suspect disclosed witness's previously unknown identity after police administered defective Miranda warnings).

Id.; Commonwealth v. Larkin, 429 Mass. 426, 437 (1999); Commonwealth v. Torres, 424 Mass. 792, 798-800 (1997). See, e.g., Commonwealth v. Prater, 420 Mass. 569, 582-83 (1995) (where first confession was involuntary due primarily to the defendant's intoxication, the Court held that the second confession came after a "break in the stream of events" because it came 90 minutes later when the effects of the alcohol had dissipated; further, second confession was not motivated by a feeling that the "cat was out of the bag", but because the defendant was now sober and feeling pangs of guilt, had hope for favorable treatment, and felt the pressure to seek expiation by confession). Police, of course, can only avoid or remedy this problem if they understand the circumstances which lead a court to conclude that a suspect is in custody.

Realizing that a custodial interrogation is going to take place, police must immediately advise the suspect of his Miranda rights. (For a comprehensive discussion of the elements of "custody," see Section II B.) If, however, police realize that a suspect has already made unwarned custodial statements, no matter how incriminating (e.g. a statement of alibi, self-defense, or even a false exculpatory statement), police should not only administer Miranda warnings before resuming questioning but they should also take a break in the interrogation to eliminate any coercive circumstances. Smith, 412 Mass. at 835.

For example, after unwarned custodial interrogation, police should delay any additional warned interrogation for a significant period of time and allow the suspect to make a phone call or consult with an attorney. Commonwealth v. Watkins, 375 Mass. 472, 485 (1978); Commonwealth v. Meehan, 377 Mass. 552, 570-571(1979); see Lyons v. Oklahoma, 322 U.S. 596 (1944). If the defendant has made incriminating unwarned statements and erroneously believes that the "cat is out of the bag" police might be able to put the "cat back in the bag" by informing the suspect that his unwarned statements were illegally obtained and are not admissible against him. Smith, 412 Mass. at 830 n.8; see Fisher v. Scafati, 439 F. 2d 307, 311 (1st Cir.), cert. denied, 403 U.S. 939 (1971). Because of the obvious difficulties in making these hindsight evaluations, you should become familiar with the factors which indicate that a suspect is in custody.

III. THE CONSTITUTIONAL RIGHT TO COUNSEL

Pursuant to the Sixth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights, once adversary proceedings commence against someone accused of a crime, the accused has the right to be assisted by legal counsel until the proceedings are concluded. For police officers, this means that a suspect may not be interrogated after the commencement of adversary criminal proceedings unless the suspect voluntarily, knowingly, and intelligently waives his right to be assisted

by an attorney during questioning. Kuhlman v. Wilson, 106 S.Ct. 2616 (1986); Brewer v. Williams, 430 U.S. 387 (1977); Kirby v. Illinois, 406 U.S. 682 (1972); Commonwealth v. Jones, 403 Mass. 279, 286 (1988). However, the right to counsel is offense specific. Thus, where adversary proceedings have commenced against a defendant on one crime and he has invoked his right to counsel as to that crime, the police may question the defendant about a different, unrelated, and uncharged offense without violating the defendant's Sixth Amendment right to counsel. See Commonwealth v. Chase, 42 Mass. App. Ct. 749, 755-756 (1997). However, the police must still adhere to the requirements of the Fifth Amendment, i.e., voluntariness of statements and Miranda warnings.

A. Adversary Proceedings

The constitutional right to be assisted by an attorney is triggered by the commencement of adversary criminal proceedings against a suspect. Before such proceedings commence, police officers need not be concerned with the constitutional right to counsel when questioning a suspect. But, once adversary proceedings commence, a suspect must waive his right to counsel before being questioned, even if he is not in custody.

"Adversary proceedings" commence when formal charges have been brought against a suspect, Kuhlman v. Wilson, 106 S.Ct. 2616 (1986) and he is arraigned, Moore v. Illinois, 934 U.S. 220 (1972); indicted, Brewer v. Williams, 430 U.S.

387 (1977); or attends a probable cause hearing. Coleman v. Alabama, 379 U.S. 1 (1974). Thus, a defendant does not have a constitutional right to counsel when testifying before a grand jury. Commonwealth v. Griffin, 404 Mass. 372, 374 (1989). The mere issuance of a complaint and an arrest warrant, without more, does not constitute the commencement of adversary proceedings. Accordingly, a suspect in custody, who has waived his Miranda rights, may be questioned without regard to the right to counsel so long as the suspect has yet to be arraigned or indicted, and has not appeared at a probable cause hearing. Commonwealth v. Brazelton, 404 Mass. 783, 785 (1989); Commonwealth v. Jones, 403 Mass. 279, 286 (1988); Commonwealth v. Mahoney, 400 Mass. 524, 528-529 (1987); Commonwealth v. Mandeville, 386 Mass. 393, 401 (1982); Commonwealth v. Smallwood, 379 Mass. 878, 884 (1980).

B. Interrogation

Once adversary proceedings have commenced, the constitutional right to counsel is violated if a suspect is interrogated without first waiving the right. As with the Fifth Amendment and a suspect's Miranda rights, "interrogation" for purposes of the Sixth Amendment includes express questioning and conduct likely to elicit incriminating statements from a suspect. Kuhlman v. Wilson, 106 S.Ct. 2616 (1986); Michigan v. Jackson, 475 U.S. 625 (1986); Brewer v. Williams, 430 U.S. 387 (1977); Massiah v. United States, 377 U.S. 201 (1964). (Please review the

discussion of conduct constituting "interrogation" in Section II of this article.)

The Sixth Amendment does not preclude the use at trial of a suspect's volunteered statements -- statements which were not elicited from the suspect by the police as part of an interrogation. Kuhlman v. Wilson, 106 S.Ct. 2616 (1986); Michigan v. Jackson, 475 U.S. 625 (1986); Commonwealth v. Frangillo, 359 Mass. 132, 136-137 (1971). Accordingly, spontaneous statements to a police officer and overheard statements are admissible in court.

A police officer may secretly listen to a suspect's private conversations without violating his constitutional right to counsel so long as the police officer's conduct does not amount to an interrogation of the suspect, Kuhlman v. Wilson, 106 S.Ct. 2616 (1986); United States v. Henry, 447 U.S. 264 (1980), and the suspect is not speaking to his attorney, United States v. Hoffa, 385 U.S. 293 (1986); Commonwealth v. Fontaine, 402 Mass. 491, 498 (1988). For example, a police officer is not eliciting incriminating statements from a suspect, and therefore does not violate the suspect's right to counsel, by hiding in a place where the officer has the right to be and overhearing a suspect's incriminating conversations. See Kuhlman v. Wilson, 106 S.Ct. 2616 (1986); United States v. Henry, 447 U.S. 264 (1980). But, if the police officer instructs or encourages an informant to engage the defendant in an incriminating conversation, the police officer will be deemed to have

interrogated the prisoner in violation of the Sixth Amendment by actively creating a situation likely to elicit the statements from the suspect. Kuhlman v. Wilson, 106 S.Ct. 2616 (1986); Massiah v. United States, 377 U.S. 201 (1964); Commonwealth v. Harmon, 410 Mass. 425, 428 (1991); Commonwealth v. Rancourt, 399 Mass. 269, 274-275 (1987); Commonwealth v. Rodwell, 394 Mass. 694 (1985); Commonwealth v. Paradiso, 24 Mass. App. Ct. 142, 145 (1987), rev. denied, 400 Mass. 1106.

Whether or not a suspect is interrogated, the right to counsel is violated if a police officer interferes with a suspect's relationship with his attorney. Therefore, under no circumstances should a police officer eavesdrop on a conversation between a suspect and his attorney, or allow an informant to tell a police officer about such a conversation. United States v. Hoffa, 385 U.S. 293 (1966); Commonwealth v. Fontaine, 402 Mass. 491, 498 (1988). Further, a police officer should not allow an informant to attend a meeting between a suspect and his attorney without first consulting the district attorney's office. Weatherford v. Bursey, 429 U.S. 545 (1977). These types of conduct are inherently dangerous to any subsequent prosecution because they allow the defendant to argue that his relationship with his attorney has been invaded and his defense prejudiced. Commonwealth v. Fontaine, 402 Mass. 491, 498 (1988); Commonwealth v. King, 400 Mass. 283, 287-290 (1987); Commonwealth v. Manning, 373 Mass. 438

(1977); Commonwealth v. Carlson, 17 Mass. App. Ct. 52 (1983).

C. Waiver Of The Right To Counsel

If a police officer wishes to interrogate a suspect after adversary proceedings have commenced, the suspect must first be advised of the right to have counsel present during the interrogation, and then execute a voluntary, knowing, and intelligent waiver of the right. Patterson v. Illinois, 108 S.Ct. 2389 (1988); Brewer v. Williams, 430 U.S. 387 (1977); Commonwealth v. Curtis, 388 Mass. 637 (1983). Police officers are encouraged to comply with this requirement by reading the suspect the Miranda warnings. Because the Miranda warnings include a statement that the suspect has the right to have an attorney present during questioning, a waiver of the Miranda rights will serve as a valid waiver of the right to counsel. Patterson v. Illinois, 108 S.Ct. 2389 (1988); United States v. Payton, 615 F.2d 922 (1st Cir. 1980). (Please review the discussion of waiver of Miranda rights in Section II of this article.)

If at any time the suspect requests the assistance of an attorney, any prior waiver of the right to counsel is deemed revoked and questioning must immediately cease with respect to the crime for which adversary proceedings have commenced. Thereafter, the police may initiate questioning only as to unrelated crimes for which adversary criminal proceedings have not yet commenced. Maine v. Moulton, 474 U.S. 159 (1985); United States v. Edwards, 366 F.2d 853 (2nd Cir.

1966); Commonwealth v. Hawkins, 26 Mass. App. Ct. 910 (1988); W. LaFave, Criminal Procedure 6.4. With respect to the crime charged, once the suspect asserts his right to be assisted by counsel, questioning may not resume later unless the suspect initiates a new discussion during which he expressly waives his right to counsel. Michigan v. Jackson, 475 U.S. 625 (1986).

D. Sixth Amendment Violations - Fruit Of The Poisonous Tree

To protect a suspect's constitutional right to assistance of counsel, "fruits" of a police officer's Sixth Amendment violations will be suppressed if their use at trial would prejudice the suspect's defense. United States v. Morrison, 449 U.S. 361 (1980). In addition to suppression, dismissal of the complaints or indictments linked to the violation may be the appropriate remedy where the prejudice resulting from the violation is so pervasive that suppression alone would be inappropriate. Commonwealth v. Fontaine, 402 Mass. 491, 498 (1988); Commonwealth v. King, 400 Mass. 283, 287-292 (1987). For example, dismissal is appropriate if a police officer contacts a defendant following the commencement of adversary proceedings and disparages the defendant's attorney in an effort to turn the defendant into a government informant, Commonwealth v. Manning, 373 Mass. 438, 442-445 (1977); or secretly eavesdrops on a conversation between a suspect and attorney

during which the merits of the suspect's pending criminal charges are discussed. Commonwealth v. Fontaine, 402 Mass. 491 (1988).

IV. THE ROSARIO RULE

In Commonwealth v. Rosario, 422 Mass. 48 (1996), the Supreme Judicial Court considered whether a defendant's right to a speedy arraignment had been violated where police delayed bringing him to court so that they could interview him. The court created a new rule providing for a six-hour window of time after arrest within which police may interview an arrestee without risk that the statements will be suppressed because of violation of the right to speedy arraignment.

The Rosario court pointed out that Mass. R. Crim. P. 7(a)(1) provides that "[a] defendant who has been arrested shall be brought before a court if then in session, and if not, at its next session." The Supreme Judicial Court then adopted a rule that "[a]n otherwise admissible statement is not to be excluded on the ground of unreasonable delay in arraignment, if the statement is made within six hours of the arrest (day or night), or if (at any time) the defendant made an informed and voluntary written or recorded waiver of his right to be arraigned without unreasonable delay." Rosario, 422 Mass. at 56. The court noted that if the arrestee is suffering from a self-induced disability like alcohol intoxication or drug consumption, then the six hours does not begin to run until the disability ends. Similarly,

any delays for reasons not attributable to the police, like natural disasters or emergencies, do not count toward the six-hour period. Id. at 57. See also Commonwealth v. Ortiz, 422 Mass. 64, 68-70 (1996).

Thus, police may not question a defendant who has been arrested more than six hours after his arrest unless he waives his Rosario rights. A recommended waiver form follows this section.

Train 3

Waiver

I, _____, have been informed that I have the right to be brought to court when it is open to be arraigned on the charges on which I have been arrested.

I have been informed that the _____ District Court is open Monday through Friday, 8:30 a.m. to 4:30 p.m., except legal holidays.

I have also been informed that the police may not question me for more than six hours after my arrest unless I give them my permission to do so. Having these rights in mind, I wish to continue speaking with the police.

Signed: _____

Witnessed by: _____

Date: _____

Time: _____

WARRANTLESS SEARCHES AND SEIZURES
FOREWORD

As a general matter, the Fourth Amendment to the United States Constitution and Article Fourteen of the Declaration of Rights to the Massachusetts Constitution provide that people shall remain free from unreasonable searches and seizures, and that warrants shall only issue upon a showing of probable cause. Unfortunately, these constitutional provisions offer no express guidance as to what constitutes an "unreasonable" search and seizure, or when a "warrant" is required. It is therefore no great wonder that the area of "search and seizure" law has over the years become so complex and dynamic.

Although in recent years emphasis seems to have shifted from the "warrant" requirement to the "reasonableness" requirement, searches and seizures conducted outside of the scope of valid warrants are nonetheless still presumed to be invalid. Commonwealth v. Antobenedetto, 366 Mass. 51, 57 (1974). When a warrantless search is conducted, the burden is on the Commonwealth to show that the search and any resulting seizure falls within the narrow class of permissible exceptions. Id. The purpose of these materials is to outline the parameters of those permissible exceptions and to offer some guidance in their application.

INTRODUCTION

What Is A Search And Seizure?

As a preliminary matter police officers should be familiar with what conduct constitutes a search and thus implicates a person's constitutional rights and what conduct

may occur outside the restraints of the Fourth Amendment and Article 14. A seizure is generally defined as "some meaningful interference with an individual's possessory interests in . . . property." United States v. Jacobsen, 466 U.S. 109, 113 (1984). A search is less simply defined but includes an exploratory investigation, invasion, quest, or physical intrusion by sight or otherwise. For constitutional purposes, however, a search only occurs when there is such an intrusion into an area in which a person has a "reasonable expectation of privacy." See Terry v. Ohio, 392 U.S. 1, 9 (1968). A "reasonable expectation of privacy" has a dual aspect: first, a person must have an actual (subjective) expectation that a particular place will be private; and second, the expectation must be one that society recognizes as "reasonable." Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). See also Commonwealth v. Welch, 420 Mass. 646, 653 (1995); Commonwealth v. Krisco Corporation, 421 Mass. 37, 41-42 (1995). It is the second aspect that is most frequently the topic of debate and judicial decision.

The factors used by the courts to determine whether an expectation of privacy is reasonable include whether a particular place is a common area, whether it was freely accessible to others besides the defendant, whether the defendant controlled access to the area or took steps to exclude others, and whether the general public is invited on the premises (as in business or commercial premises). See Commonwealth v. Price, 408 Mass. 668, 672 (1991); Commonwealth v. Montanez, 410 Mass. 290, 301-302 (1991);

Commonwealth v. D'Onofrio, 396 Mass. 711, 717 (1986);
Commonwealth v. Serbagi, 23 Mass. App. Ct. 57, 61-62 (1986);
Commonwealth v. Krisco Corporation, 421 Mass. 37, 42 (1995);
Commonwealth v. Welch, 420 Mass. 646, 653-654 (1995).

Examples of places where individuals had no reasonable expectation of privacy include the cellar of an apartment building to which all tenants had access, Commonwealth v. Thomas, 358 Mass. 771, 773-775 (1971); the dropped ceiling in the common hallway of an apartment building, Montanez, 410 Mass. at 301-302; an unlocked common hallway in an apartment building, Commonwealth v. Dinnall, 366 Mass. 165, 166-167 (1974); a canteen open to all hospital employees, Sullivan v. District Court of Hampshire, 384 Mass. 736, 742 (1981); observation through the window of a van from a parking lot behind a store, Commonwealth v. Podgurski, 386 Mass. 385, 392 (1982), cert. denied, 459 U.S. 1222 (1983); an alleyway between apartment buildings, Commonwealth v. Frazer, 10 Mass. App. Ct. 429, 431-432 (1980); a parking lot shared by tenants of several apartment buildings, Commonwealth v. Myers, 16 Mass. App. Ct. 554, 556 (1983); a grass verge outside a condominium complex accessible to all, Serbagi, 23 Mass. App. Ct. at 61-62; private conversations carried on in an apartment which can be overheard unaided from a common hallway or an adjoining apartment, Commonwealth v. Panetti, 406 Mass. 230, 232 (1989); a conversation concerning a business transaction in a hotel room where the room is registered to someone who the defendant had never met, Price, 408 Mass. at 672; a person

who stays past checkout time in a hotel/motel regardless of whether he is present in the room at time of search, Commonwealth v. Brass, 42 Mass. App. Ct. 88, 89-92 (1997); the contents of a wallet left at a pre-release center after the owner moved out, Commonwealth v. Pina, 406 Mass. 540, 545 (1990); objects observed with binoculars or a flashlight, Commonwealth v. Ortiz, 376 Mass. 349, 353 (1978); garbage bags placed at the curb for garbage pick-up, California v. Greenwood, 486 U.S. 35, 40 (1988); Commonwealth v. Pratt, 407 Mass. 647, 660-661 (1990); a private, residential driveway which was clearly visible from a public way and the normal route used to approach the front door of the residence, Commonwealth v. A Juvenile (No.2), 411 Mass. 157, 160-161 (1991); Commonwealth v. Butterfield, 44 Mass. App. Ct. 926 (1998) (same); telephone message records which involved the voluntary conveyance of information to third parties, Commonwealth v. Cote, 407 Mass. 827, 834 (1990); naked-eye observations of a greenhouse from a helicopter within navigable air-space, Florida v. Riley, 109 S. Ct. 693, 696-697 (1989); surveillance of a vehicle or person by following in a police cruiser, Michigan v. Chesternut, 486 U.S. 567, 573-575 (1988); Commonwealth v. Groves, 25 Mass. App. Ct. 933, 935 (1987); the braking system of a motor vehicle lawfully towed and impounded by police, Commonwealth v. Mamacos, 409 Mass. 635, 640 (1991); the common locker room at a fire station, Commonwealth v. Welch, 420 Mass. 646, 653-654 (1995); inserting a key into a lock, accessible from a common

hallway, and turning the key to see whether it fits, Commonwealth v. Alvarez, 422 Mass. 198, 208-210 (1996); telephone calls of state prison inmates, Caciccio v. Secretary of Public Safety, 422 Mass. 764, 772-773 (1996); physical characteristics of the soles of one's shoes, Commonwealth v. Billings, 42 Mass. App. Ct. 261, 265 (1997).

Places in which individuals had a reasonable expectation of privacy include a locked hallway in an apartment building under exclusive control of the defendant, Commonwealth v. Hall, 366 Mass. 790, 795 (1975); a locked mailbox, Commonwealth v. Garcia, 34 Mass. App. Ct. 386, 392 (1993); luggage left unclaimed by a passenger with a claim ticket at an airport for three hours, Commonwealth v. Small, 28 Mass. App. Ct. 533, 535 (1990); private conversations in an apartment overheard from a basement crawl space used only for the housing and repair of utilities and not accessible by tenants or the public, Commonwealth v. Panetti, 406 Mass. at 233; contents of a dumpster in a fenced and locked alley next to defendant's commercial premises which was not accessible nor were contents visible to public, Commonwealth v. Krisco Corporation, 421 Mass. 37, 45 (1995); contents of a closed and locked briefcase that was thrown into the fenced-in backyard of defendant's family's home, Commonwealth v. Straw, 422 Mass. 756, 759-761 (1996); a dormitory room at a public college, Commonwealth v. Neilson, 423 Mass. 75, 77 (1996).

The question is not finally determined according to property rights and a police officer does not conduct a

search by merely observing activity from a vantage point to which any member of the public usually has access.

CONSENT SEARCHES

Notwithstanding the rights against unreasonable searches and seizures granted by the state and federal constitution, a person may waive these rights and consent to a search of his or her person, home or belongings. United States v. Matlock, 415 U.S. 164, 169-171 (1973); see Commonwealth v. Corriveau, 396 Mass. 319, 327-328 (1985) (defendant, voluntarily at station, consented to benzidine test after full explanation); Commonwealth v. Marmolejos, 35 Mass. App. Ct. 1, 4 (1993) (codefendant consented to re-entry of undercover trooper who had made controlled buy there a few minutes earlier). To be valid, such consent must be obtained prior to the commencement of the search. Commonwealth v. Spofford, 343 Mass. 703, 707-708 (1962). It must be unfettered by coercion, express or implied; in other words, consent must be something more than a mere acquiescence to a claim of lawful authority. Commonwealth v. Krisco Corporation, 421 Mass. 37, 46 (1995); Commonwealth v. Cantalupo, 380 Mass. 173, 177-178 (1980). Consent must be "unequivocal and specific," freely and voluntarily given. The burden of proving that the consent was voluntary is on the Commonwealth. Commonwealth v. Krisco Corporation, 421 Mass. 37, 46 (1995); Commonwealth v. Buchanan, 384 Mass. 103, 106 (1981); Commonwealth v. Rexach, 20 Mass. App. Ct. 919, 919 (1985).¹

¹ Under G.L. c. 90, 24(1)(e) & (f), the implied consent law, a driver's blood or breath may be tested upon

Finally, consent may be given expressly or may be inferred from the person's conduct. See Commonwealth v. Beldotti, 409 Mass. 553, 555-556 (1991) (defendant's consent valid where he called police, told them where dead body was in his home, expressed deep emotional grief about victim's death, and he and his parent agreed to cooperate with police); Cantalupo, 380 Mass. at 174, 177 (defendant's consent valid where he said, "Hey, I'm clean, search me," and opened his jacket for police); Robbins v. MacKenzie, 364 F.2d 45 (1st Cir. 1966) (consent valid where defendant opened door and stepped aside); Commonwealth v. Voisine, 414 Mass. 772, 783 (1993) (third party's consent valid where she pointed to bedroom where defendant was hiding); Commonwealth v. Berry, 420 Mass. 95, 103-107 (1995) (consent implied where defendant voluntarily left cigarettes and matches on counter outside juvenile holding area for several hours after submitting himself voluntarily to police and agreeing implicitly to abide by police policy banning smoking in exchange for shelter). But see Commonwealth v. McGrath, 365 Mass. 631, 631 (1974) (pat-down invalid where defendant said "I'm clean this time," and spread his hands out).

Whether consent has been given voluntarily is a question of fact to be determined in the circumstances of each case. Commonwealth v. Krisco Corporation, 421 Mass. 37, 46 (1995); Commonwealth v. Berry, 420 Mass. 95, 104 (1995); Commonwealth v. Aguiar, 370 Mass. 490, 496 (1976). No one

his "actual" consent. Commonwealth v. Davidson, 27 Mass. App. Ct. 846, 849 (1989).

factor will typically be controlling. Commonwealth v. Angivoni, 383 Mass. 30, 34-35 (1981). A person's age, intelligence, prior police experience, physical and mental health, and sobriety are all relevant. Id. at 34; Commonwealth v. Greenberg, 34 Mass. App. Ct. 197, 202 (1993); Commonwealth v. Heath, 12 Mass. App. Ct. 677, 681-683 (1981); Commonwealth v. Egan, 12 Mass. App. Ct. 658, 663 (1981). The fact that a person is not advised of his Fourth Amendment rights, or is not informed of his right to refuse to consent to a search are factors, although neither is required nor conclusive on the issue of the validity of the consent. Schneckloth v. Bustamonte, 412 U.S. 218, 248-249 (1973); Commonwealth v. Krisco Corporation, 421 Mass. at 46 (1995); Commonwealth v. Walker, 370 Mass. 548, 555, cert. denied, 429 U.S. 943 (1976)².

Finally, the fact that a person is under arrest or otherwise detained is an important, although not a deciding factor, since such circumstances are inherently coercive. Commonwealth v. Harmond, 376 Mass. 557, 561 (1978); Heath, 12 Mass. App. Ct. at 684; Commonwealth v. Franco, 419 Mass. 635, 642 (1995). However, under no circumstances will consent obtained through fraud or deceit be valid, since this would involve the use of implied coercion. Gouled v. United States, 255 U.S. 298 (1921).³ In certain situations,

² In this context, police should tell a suspect that they will "apply for" a warrant rather than "obtain" one. In any event, even where police announce their intention to seek a warrant if consent is not given, a resulting consent will not necessarily be invalid. Commonwealth v. Deeran, 364 Mass. 193, 196 (1973).

however, the police may employ a ruse to gain entry into a suspect's home. In Commonwealth v. Villar, 40 Mass. App. Ct. 742, 745-747 (1996), for example, the officers placed a person known to the occupants in front of the apartment door peephole when they knocked on the door. The suspects opened the door, and the officers made plain view observations of the inside of the apartment (and of several bags of cocaine) from their lawful position outside in the common hallway. The use of the ruse to open the door did not render the search illegal.

Under certain circumstances, "third party" consent may be granted and evidence seized in a resulting search will be admissible. The test is whether the consenting person has common authority over, or other sufficient relationship to, the place or thing to be searched. Walker, 370 Mass. at 554. That is, the parties in question must have joint access or control over the place or thing in question to the extent that each would reasonably assume that the other might permit the common area to be searched. Commonwealth v. Deeran, 364 Mass. 193, 196 (1973); Commonwealth v. Brown, 32 Mass. App. Ct. 649, 651-652 (1992); Commonwealth v. Welch, 420 Mass. 646, 654 (1995) (common locker room at fire station was under control of fire department and deputy fire chief's granting police permission to search constituted valid consent to search room).

³ This does not apply to situations, for example, where an informant is invited into a suspect's home for the purpose of transacting illegal business. See Hoffa v. United States, 385 U.S. 293, 303 (1966).

A mere proprietary interest, however, will not by itself validate a third-party consent. Matlock, 415 U.S. at 171 n.7. Nor will many other legal relationships. For example, a hotel manager cannot consent to the search of a guest's hotel room unless the guest has checked out, United States v. DePrima, 472 F.2d 550 (1st Cir. 1979); a landlord cannot consent to the search of a tenant's apartment, and an employer cannot usually consent to the search of an employee's property, or vice versa, United States v. Blok, 181 F.2d 1019 (D.C. Cir. 1951); university officials, while entitled to conduct health and safety inspections of dormitory rooms, have no authority to consent or join in a police search for evidence of a crime, Commonwealth v. Neilson, 423 Mass. 75, 79 (1996). But an employee who has been given charge of certain property may be able to validly consent to a search of it, if the consent is consistent within the employee's authority. Commonwealth v. Wahlstrom, 375 Mass. 115, 117-118 (1978); Commonwealth v. Campbell, 352 Mass. 387, 401 (1967).

Other relationships by their nature carry with them the full authority to consent. In certain circumstances, consent granted by one spouse is valid against the other, Commonwealth v. Martin, 358 Mass. 282, 288 (1970); Commonwealth v. Podgurski, 44 Mass. App. Ct. 929, 930-931 (1998) (wife's consent for police to enter home to serve restraining order on defendant and to search for weapons valid even though spouse had hours earlier relocated to a shelter), and consent by a parent is valid against a child.

Commonwealth v. Ortiz, 422 Mass. 64, 70 (1996). Similarly, consent by one tenant is valid as to all others, at least to those areas which are common to all. Commonwealth v. Connolly, 356 Mass. 617, 624, cert. denied, 400 U.S. 843 (1970). But see Commonwealth v. Ploude, 44 Mass. App. Ct. 137, 140-141 (1998) (co-owner who retained portion of leased property for own purposes and had "free rein" of building he shared with defendant had authority to consent by fire and ATF officials).

Finally, the scope of a consent search is reasonable and legal to the extent that the individual has consented. If the individual places no limitations on the scope of the search -- a so-called "general consent" -- the police are entitled to look anywhere where the items they are looking for might be hidden. If the police tell an individual they would like to search his person for drugs and the individual opens his jacket and says, "Hey, I'm clean, search me," the police may search both his upper body and lower body below his belt because the individual's words place no limitation on the scope of the search and he did not object to any part of the search. Cantalupo, 380 Mass. at 173; see also Commonwealth v. Moore, 32 Mass. App. Ct. 924, 925 (1992). Likewise, if police ask an individual if they can search his car for drugs and the individual gives a general consent, the police may look for the drugs in closed containers within his car. Florida v. Jimeno, 111 S. Ct. 1801, 1804 (1991).

PLAIN VIEW SEIZURES

Under certain limited circumstances it is lawful for the police to seize property without a warrant even though that property is unrelated to, or not within the scope of, an otherwise lawful search then being conducted. This type of "search and seizure" may occur in the course of an inventory search, a search under a warrant, or any other lawful search. This exception to the warrant requirement is commonly known as the "plain view" doctrine.⁴

The Commonwealth has the burden of proving that evidence was properly seized under the plain view exception. It must show that: (1) the police had prior justification for the intrusion; (2) the evidence was visible from a place where the officer had a right to be; (3) the discovery was inadvertent; and (4) it was immediately apparent that the evidence was contraband, fruits of a crime, or mere evidence. Commonwealth v. Santana, 420 Mass. 205, 211 (1995); Commonwealth v. Rodriguez, 378 Mass. 296, 303 (1979); Commonwealth v. Accaputo, 380 Mass. 435, 447-448 (1980). In short, the Fourth Amendment does not bar the seizure of evidence which tends to prove the commission of a

⁴ A "plain view" seizure should not be confused with a "public view" seizure. A person has no reasonable expectation of privacy in an area which can be viewed from a lawful vantage point by members of the public. Commonwealth v. Oreto, 20 Mass. App. Ct. 581, 584-586 (1985) (exposed interior of car); cf. Commonwealth v. One 1985 Ford Thunderbird Automobile, 416 Mass. 603, 608-610 (1994) (diminished expectation of privacy in fenced backyard visible from brief, reasonable helicopter flights at 700-800 feet). Thus, contraband, fruits of a crime, or mere evidence can be lawfully seized without a warrant if seen in "public view."

crime, provided there is probable cause at the time of the seizure to believe that the evidence will aid in apprehending or convicting a particular suspect, Commonwealth v. Murray, 359 Mass. 541, 547 (1971), and provided it was not discovered by design or under a general exploratory search, Commonwealth v. Bond, 375 Mass. 201, 206 (1978); Commonwealth v. Fields, 2 Mass. App. Ct. 679, 682 (1974). The burden is on the Commonwealth to show the nexus between the evidence seized and the crime in question, Commonwealth v. Cefalo, 381 Mass. 319, 332-334 (1980); Commonwealth v. Lee, 2 Mass. App. Ct. 700, 703 (1979), and that the police had probable cause at the time of the seizure to believe the evidence was relevant, Rodriguez, 378 Mass. at 304. Finally, once an item is observed whose general character plausibly indicates evidential relevance, police may approach more closely to note detail and make a selective seizure. Commonwealth v. Young, 382 Mass. 448, 458-459 (1981).

The first factor may be satisfied in a number of ways. The police may lawfully enter a premises under the authority of a search warrant, Accaputo, 380 Mass. at 447; or an arrest warrant, Commonwealth v. Franco, 419 Mass. 635, 640 (1995); Commonwealth v. Acosta, 416 Mass. 279, 282 (1993), or by a valid consent, Commonwealth v. Cantalupo, 380 Mass. 173, 178-179 (1980) or by valid warrantless entry based on exigent circumstances, Commonwealth v. Navarro, 39 Mass. 161, 164 (1995). They may have come across an item seized in the course of a Terry stop, Commonwealth v. Santana, 420

Mass. 205, 211-212 (1995); Commonwealth v. King, 389 Mass. 232, 241-243 (1983); or search incident to arrest, Commonwealth v. DiMatteo, 12 Mass. App. Ct. 547, 549 (1981). Or they may be conducting an inventory search of a person, Commonwealth v. Gliniewicz, 398 Mass. 744, 750 (1986); or an automobile at the station house, Commonwealth v. Wilson, 389 Mass. 115, 117 (1983). So long as the police are lawfully in the place from which they see the item to be seized, the first prong of the plain view exception will be satisfied.

Second, the item seized must be visible from the place where the officer had a right to be. For example, if an officer is conducting a station house inventory search of an arrestee's belongings and in the course of the inventory sees a quantity of a controlled substance, the officer may seize that item. Commonwealth v. Battle, 365 Mass. 472, 476 (1975). An officer who sees a suspect on the street holding a package commonly used for drugs may seize it. Commonwealth v. Dowdy, 36 Mass. App. Ct. 495, 497 (1994). An officer who lawfully stops a motor vehicle and who sees, even with the aid of a flashlight, a weapon or contraband in the interior of the vehicle may seize such items. Commonwealth v. Alvarado, 420 Mass. 542, 548 (1995); Commonwealth v. Sergienko, 399 Mass. 291, 295 (1987); Commonwealth v. Doulette, 414 Mass. 653, 656 (1993). Additionally, an officer who lawfully conducts an administrative search may seize contraband. Commonwealth v. Eagleton, 402 Mass. 199, 206-207 (1988). Likewise, an officer conducting a lawful inventory search may seize

controlled substances located inside an open container. Commonwealth v. Fuller, 30 Mass. App. Ct. 927, 928 (1981). During a traffic stop, an officer may ask for the operator's registration and then look into the glove compartment for evidence of a crime or contraband as the operator opens it. Commonwealth v. Blake, 23 Mass. App. Ct. 456, 462-463 (1987); see also Commonwealth v. Allain, 36 Mass. App. Ct. 595, 601 (1994); see also Commonwealth v. Santana, 420 Mass. 205, 211 (1995) (reasonable for police officer to lean into automobile where he saw a bag of cocaine in plain view, where officer was merely returning milk to place from where the defendant had taken it).

Moreover, an officer may knock on the door to an apartment without invoking his authority to have the door opened and, from his lawful position in the common hallway outside of the apartment, make plain view observations of the inside of the apartment. Commonwealth v. Villar, 40 Mass. App. Ct. 742, 745 (1996). It is also proper for an officer, who has lawfully entered the premises pursuant to an arrest warrant, to escort the defendant into other areas of his residence and seize items found in plain view as long as the defendant was moved for a proper purpose and not as a pretext to search these other areas. Commonwealth v. Franco, 419 Mass. 635, 641-642 (1995) (defendant moved to room with increased ventilation because he was suffering from adverse reaction to odor from material in kitchen sink). The seizure of additional evidence is also proper when the officer's actions of securing items in plain view lead to the discovery of other evidence. Commonwealth v.

Franco, 419 Mass. 635, 642 (1995) (officer lifted shelf to seize gun in plain view and discovered marijuana and cocaine).

Third, the discovery of the items must have been inadvertent, that is, unexpected or unanticipated. If a search warrant, for example, fails to mention an object the police have probable cause to believe is in a particular place and the police find the object in that place, this third requirement has not been satisfied. Commonwealth v. Lett, 393 Mass. 141, 147 (1984). This does not mean, however, that the police must be totally surprised at the discovery of the item for it to be inadvertent. Relevant case law suggests that even if the police have a "hunch" or "suspicion" that an item may be in a particular place, its discovery may be "inadvertent" so long as this "plain view" exception is not being used as a pretext to conduct a general exploratory search. Cefalo, 381 Mass. at 331-332. See Commonwealth v. Santana, 420 Mass. 205, 211 (1995) (inadvertence requirement met where officer was not looking for evidence but merely returning milk to place where defendant had taken it when he came across bag of cocaine). The inadvertence requirement does not apply if the items seized are stolen goods. Commonwealth v. LaPlante, 416 Mass. 433, 440 n.9 (1993). Compare Horton v. California, 110 S. Ct. 2301, 2308-2309 (1990) (inadvertence not required under Fourth Amendment).

Fourth, it must be immediately apparent to the police that the item they see is evidence of a crime. Stolen property seen in plain view may be seized if the police have

probable cause to believe it is stolen. Commonwealth v. Anselmo, 33 Mass. App. Ct. 602, 615 (1992); Commonwealth v. Fudge, 20 Mass. App. Ct. 382, 387 (1985). A hunch or mere suspicion that an item is stolen is not enough. Id.; see also Arizona v. Hicks, 480 U.S. 321, 326 (1987). Where possession of certain property constitutes a crime, it may be seized if in plain view. Commonwealth v. Irwin, 391 Mass. 765, 771 (1984). Fruits or instrumentalities of a crime may be seized under the exception if it can be shown that at the time the items were first observed they were probably pertinent to the type of crime not too distant from the one under investigation. Accaputo, 380 Mass. at 447-448; Bond, 375 Mass. at 332-334.

Moreover, "mere evidence," seen in plain view during the course of an otherwise lawful search may be seized, 1) if the police have probable cause to believe that the item or items are plausibly related to proof of the crime then under investigation, and 2) if the evidence will aid in a particular apprehension or conviction. LaPlante, 416 Mass. at 440 (wet sock found during search for evidence of murders by drowning); Fields, 2 Mass. App. Ct. at 703 (utility bill addressed to defendant found during search pursuant to warrant for narcotics; it tends to prove ownership of premises); Commonwealth v. Halsey, 41 Mass. App. Ct. 200, 202-203 (1996) (seizure of sexually explicit pictures and x-rated videotapes found during search pursuant to warrant for evidence of sexual abuse of children; officers had

probable cause to believe materials bore nexus to crimes under investigation).

In summary, so long as a police officer is lawfully in a given place, is looking where he or she could look given the scope of the lawful authority, does not have probable cause to find what is seen, and is not otherwise conducting a general exploratory search, the officer may lawfully seize certain items (e.g., contraband, instrumentalities of a crime, mere evidence) without a warrant.

SEARCHES UPON PROBABLE CAUSE AND EXIGENT CIRCUMSTANCES

Where an officer has probable cause to believe that evidence of a crime will be found in a particular place and circumstances exist which constitute an exigency, the evidence sought may in certain instances be seized without a warrant. This situation typically arises when an automobile is somehow connected with the criminal activity under investigation, but it may also arise in regard to certain searches of a home or a person. In any event, to conduct a valid warrantless search under this exception there must be a showing that (1) because of the exigency it was impractical to obtain a warrant, and (2) the resulting search was narrowly circumscribed by the exigency which justified the intrusion.

I. AUTOMOBILES

In Pennsylvania v. Labron, 116 S. Ct. 2485, 2487 (1996), the Supreme Court held that police may conduct a warrantless search of a motor vehicle stopped in transit or seized or searched in a public place solely on the basis of

having probable cause to believe that seizable items are located in the vehicle; the requirement of exigent circumstances to justify the warrantless search was eliminated. The Massachusetts Supreme Judicial Court has adopted the Labron rule under Article 14 Of the Massachusetts Declaration of Rights. Commonwealth v. Motta, 424 Mass. 117, 123-124 (1997). The inherent mobility of such a vehicle establishes that exigent circumstances exist, whereby a warrantless search based on probable cause may be conducted. Motta, 424 Mass. at 124; Commonwealth v. Gajka, 425 Mass. 751 (1997); Commonwealth v. Mantinez, 44 Mass. App. Ct. 513 (1998).

The exigency implicit in searching an automobile is recognized for two reasons: (1) the inherent mobility of a vehicle creates a substantial risk that contraband, fruits, instrumentalities, and evidence will be removed from the jurisdiction if a search is delayed in order to seek a warrant and (2) because automobiles, unlike homes, are subjected to pervasive governmental regulation and their use is of a public nature, the expectation of privacy concerning the contents of a vehicle is significantly lower than the expectations associated with dwellings and other structures. Id. South Dakota v. Opperman, 428 U.S. 364, 367 (1976); Motta, 424 Mass. at 123.

A. The Exigency Requirement

If an officer has probable cause to believe that seizable goods will be found in a vehicle, no more exigent circumstances are required beyond the inherent mobility of the automobile itself to justify a warrantless search.

Motta, 424 Mass. at 124; Martinez, 44 Mass. App. Ct. at 519-520. Nor does the concept of mobility of an automobile as justification for a warrantless search change because the vehicle is removed to a location where the search may be conducted with more safety, as long as the search is conducted within a reasonably immediate time. Motta, 424 Mass. at 124; Commonwealth v. Markou, 391 Mass. 27, 31-32 (1984) (search which occurred at police station two hours after stop was reasonably immediate). See also Commonwealth v. Harris, 47 Mass. App. Ct. 481, 486 (1999) (exigent circumstances justified warrantless search of the trunk of defendant's car where defendant openly transacted drug sales from the trunk of the car and the evidence sought was narcotics, which are "peculiarly vulnerable to speedy and easily accomplished destruction").

B. Probable Cause

The police officer must have probable cause to believe that seizable items will be found in the vehicle. Chambers, 399 U.S. at 62; Husty v. United States, 282 U.S. 694 (1931); Carroll, 267 U.S. at 153-154. Probable cause is defined as a "belief reasonably arising out of circumstances known to the seizing officer that an automobile or other vehicle contains that which by law is subject to seizure." Carroll, 267 U.S. at 153-154. Probable cause must be based upon objective facts and not merely on the subjective good faith of the officer. United States v. Ross, 456 U.S. 798, 823 (1982); see also Commonwealth v. Ghee, 414 Mass. 313, 316 (1993) (where tow truck driver, not acting as agent of

police, noticed odor coming from trunk, opened it, saw dead body, then quickly slammed it shut, subsequent police search was valid); Commonwealth v. Kitchings, 40 Mass. App. Ct. 591, 596 n.8 (1996) (odor of burnt marijuana emanating from vehicle provided probable cause to search vehicle).

1. Connection Between Criminal Activity And Vehicle.

If an officer has probable cause to search a particular person who is not an occupant of a vehicle, extending the warrantless search to include the car is permissible only if a clear connection between the criminal activity and the car gives the police probable cause to believe that seizable items will also be found in that vehicle. In Commonwealth v. Moon, 380 Mass. 751, 760-761 (1980), the court held that a police officer investigating an assault with a dangerous weapon did not have probable cause to search Moon's car. After police responded to a pedestrian's complaint of being assaulted by a person with a knife, they searched a vehicle pointed out to them by the victim. The victim, however, did not see Moon enter the vehicle after the assault. The court reasoned that while there may have been cause to search Moon for the knife, there was no nexus between the criminal activity and the vehicle to justify its search. See also Commonwealth v. Sanderson, 398 Mass. 761, 767 (1986); Commonwealth v. Alvarado, 420 Mass. 542, 554 (1995) (no nexus between vehicle and cocaine seized from defendant, and exigency dissolved when vehicle was impounded and removed to station). In Commonwealth v. Avery, 365 Mass. 59, 63-64 (1974), police placed a vehicle under surveillance after

receiving information from a reliable informant that its occupants had driven to Boston to sell a large quantity of drugs being stored in the car. After observing the occupants exit the vehicle and engage in conduct appearing to be a drug sale, the officer arrested the defendant and searched the vehicle. The court held that the police had probable cause to conduct the warrantless search because of the exigency of the situation and the clear connection between the criminal activity and the vehicle. See also Commonwealth v. Paredes, 35 Mass. App. Ct. 666, 669 (1993); Commonwealth v. Rosario, 37 Mass. App. Ct. 920, 922 (1994). Contrast Commonwealth v. Avalo, 37 Mass. App. Ct. 904, 907 (1994).

2. Probable Cause Arising Out Of A Radio Broadcast.

If a police officer conducts a warrantless search of a vehicle as a result of a police radio broadcast describing the vehicle and the offense for which it is being sought, the officer causing the report to be broadcast must have had probable cause to believe that the vehicle would contain seizable items. Thus, a vehicle search conducted after stopping a vehicle which conclusively matches the description broadcast to the officer may not be valid where the broadcast was made solely on the basis of information provided by a vague or secondhand citizen report. Where the officer causing the broadcast did not have probable cause to support the issuance of a warrant, the search will not be valid despite the good faith efforts of the officer acting

on the radio broadcast. Commonwealth v. Antobenedetto, 366 Mass. 51, 57 (1974); Commonwealth v. Dise, 31 Mass. App. Ct. 701, 703 & n.5 (1991); Commonwealth v. Cosme, 15 Mass. App. Ct. 448, 451-452 (1983); Markou, 391 Mass. at 31.

C. Scope Of The Search

1. In General.

Broadly stated, a warrantless vehicle search based upon probable cause may be extended only to those areas of the vehicle in which there is probable cause to believe that contraband or other evidence of a crime may be found. Ross, 456 U.S. at 813. Thus, as in the case of searches incident to an arrest, the area of the vehicle searched must be large enough to contain the contraband or item of evidence sought. Where an officer observes a suspect believed to be transporting narcotics on his person enter a taxicab, a search of the trunk area of the taxi would not be supported by probable cause where the suspect had never caused the trunk to be opened. Similarly, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase located inside the van. Id.

2. Warrantless Searches Of Containers In The Vehicle.

In United States v. Ross, 456 U.S. 800, 824-825 (1982), the Supreme Court held that if the police have probable cause to conduct a warrantless search of an entire vehicle, it is permissible to include within the search all closed

containers in which the items sought might be concealed. See Commonwealth v. Jiminez, 22 Mass. App. Ct. 286, 290-291 (1986). The Massachusetts Supreme Judicial Court has expressly adopted the Ross rule under Article 14 of the Massachusetts Declaration of Rights. Commonwealth v. Cast, 407 Mass. 891, 906-908 (1990); Commonwealth v. Wunder, 407 Mass. 909, 915 (1990); Commonwealth v. Kitchings, 40 Mass. App. Ct. 591, 597 (1996) (officer was entitled to search every part of vehicle and its contents where he saw an ammunition clip in the open glove compartment in plain view and suspect told him that a gun was on the back seat). A warrantless search under the "automobile exception" is, therefore, no broader and no narrower than could be authorized by a warrant.

However, where the relationship between the container and the vehicle is purely coincidental, a warrantless search of a closed container removed from a vehicle where the police did not have probable cause to search the entire vehicle is still prohibited. In United States v. Chadwick, 433 U.S. 1, 11-12 (1977), for example, federal agents had probable cause to believe that a locked footlocker at a train station contained marijuana. The defendant was observed carrying the locker and was arrested immediately upon placing it in the trunk of a vehicle. A warrantless search of the locker after it was seized from vehicle under the "automobile exception" was invalid. Once the locker was taken from the vehicle its mobility was eliminated and there was no danger that the marijuana contained within it would be destroyed. Since there was no clear relationship between

the locker and the car to permit a warrantless search of the entire vehicle, the warrantless search of the container was not justified under the automobile exception.

Similarly, in Arkansas v. Sanders, 442 U.S. 753, 766-767 (1979), the Supreme Court held that a warrantless search of a suitcase seized from a taxicab was unlawful. Although the police officers had probable cause to believe that the suitcase contained marijuana, the "automobile exception" was not applicable merely because the defendant was arrested in a taxicab leaving an airport. The relationship between the suitcase and the vehicle was "purely coincidental" or fortuitous and, thus, having no grounds to search the entire vehicle, the officers were obligated to seize the suitcase and seek a search warrant. Sanders, 442 U.S. at 766-767. Massachusetts follows Chadwick and Sanders. Case, 407 Mass. at 902-903; Commonwealth v. Farinon, 29 Mass. App. Ct. 945, 947 (1990).⁵

⁵ The Supreme Court, in recently overruling Sanders, thereby backing away from the Chadwick rationale, held that police may conduct a warrantless search of an automobile and the containers within it even though they only have probable cause to believe that a specific container within the car contains contraband or evidence. California v. Acevedo, 111 S. Ct. 1982, 1989 (1991). However, because Massachusetts appellate courts have not ruled on Acevedo's applicability to Massachusetts law, police in Massachusetts should continue to follow the Chadwick-Sanders reasoning and obtain search warrants when they have probable cause to believe that only the container contains evidence or contraband and the container's relationship to the car is "purely coincidental."

Finally, if probable cause exists to seize the container and open it at the scene without a warrant, police may delay the search and open the container without a warrant at the station. United States v. Johns, 469 U.S. 478, 485-487 (1985); see also Commonwealth v. Moses, 408 Mass. 136, 146 (1990). It is advisable, however, to open the container either at the scene or very soon after it is brought to the station.

II. PREMISES

The law does not require that a police officer seek a warrant to enter and search a home if a delay would endanger the lives of others or where he was called upon to give a person immediate aid. Commonwealth v. Paniaqua, 413 Mass. 796, 798 (1992); Commonwealth v. Jeffers, 27 Mass. App. Ct. 1162, 1163 (1989); Commonwealth v. Franklin, 376 Mass. 885, 902 (1978); Mincey v. Arizona, 437 U.S. 385, 392 (1978). For example, where the police have probable cause to believe that an armed fleeing felon is in a particular place, they may enter the premises to search for the suspect and any weapons he used in the crime or might have used against them. Franklin, 376 Mass. at 899; Welch v. Wisconsin, 466 U.S. 740, 752 (1984). This rule holds true even though a judge may have been available to issue a search warrant at the time of the warrantless entry. Commonwealth v. Donoghue, 23 Mass. App. Ct. 103, 108 (1986); Jeffers, 27 Mass App. Ct. at 1163. Moreover, a warrantless entry is permissible when a police officer reasonably believes that a person within a dwelling is in need of immediate assistance

because of an imminent threat of death or serious injury, or that prompt intervention is necessary to prevent threatened fire, explosion, or other destructive accident. Commonwealth v. DiGeronimo, 38 Mass. 714, 722-723 (1995); Commonwealth v. Morrison, 429 Mass. 511, 515 (1999) (warrantless entry into and search of apartment justified where "the police had very good reason to believe that a person subject to a protective order was in the apartment of the woman the order was intended to protect"); Commonwealth v. Jung, 420 Mass. 675, 681-683 (1995) (burning building creates exigency that justifies warrantless entry by firefighters, and officials did not need warrant to remain in building for a reasonable time to investigate cause of fire after it had been extinguished).

Whether an exigency existed which justifies a search under these circumstances will be determined by what was reasonable under the circumstances, but a lengthy unexplained time-lag between the discovery of the emergency and a warrantless search or entry would tend to defeat the justification. Jeffers, 27 Mass. App. Ct. at 1163; Commonwealth v. Bates, 28 Mass. App. Ct. 217, 221 (1990); see also Commonwealth v. Small, 28 Mass. App. Ct. 533, 537 (1990); Commonwealth v. Collazo, 34 Mass. App. Ct. 79, 84 (1993); Commonwealth v. Marmolejos, 35 Mass. App. Ct. 1, 4 n.6 (1993); Commonwealth v. Wilson, 38 Mass. 680, 682 (1995) (no exigency where police had over 3 hours to obtain warrant). The exigency must also be unforeseeable. The Commonwealth cannot claim, for example, that there was insufficient time to get a warrant when there was probable

cause long before the search. Commonwealth v. Krisco Corporation, 421 Mass. 37, 47 (1995) (imminent arrival of dump truck did not give rise to exigency to search dumpster, where police had had probable cause to do so for several days).

Not every warrantless entry to a home under a purported emergency situation will be valid. The Commonwealth must show that the suspect was armed, would flee or destroy evidence, or that it was otherwise impractical under the circumstances to get a search warrant. Commonwealth v. Sergienko, 399 Mass. 291, 296 (1987); Commonwealth v. Marchione, 384 Mass. 8, 12 (1981); Commonwealth v. Olivares, 30 Mass. App. Ct. 596, 599 (1991); Commonwealth v. Curcio, 26 Mass. App. Ct. 738, 746 (1989); Commonwealth v. Hamilton, 24 Mass. App. Ct. 290, 293-294 (1987). No exigency was found to exist to permit the warrantless search of a home where the defendant said he had been shot by an assailant outside his home, was immediately transported to the hospital, and his home was thereafter searched. Board of Selectmen of Framingham v. Municipal Court, 373 Mass. 783, 785 (1977); see also Commonwealth v. Douglas, 399 Mass. 141, 143 (1987); Commonwealth v. Garcia, 34 Mass. App. Ct. 386, 392 (1993); Commonwealth v. DiGeronimo, 38 Mass. 714, 725-727 (1995) (prevention of destruction of evidence rationale not applicable where there is an hour long delay). However, where there was probable cause to believe a gun, which had just been used in a robbery in an apartment, was still in the apartment which was also occupied by five

children, an unconscious man, and a suspect in the robbery, it was reasonable for the police to search the apartment for the gun without a warrant. Jeffers, 27 Mass. App. Ct. at 1163; see also Commonwealth v. Martino, 412 Mass. 267, 275-277 (1992) (police conducting surveillance on defendant's house while waiting for search warrant properly seized videotape containing evidence from defense counsel, who was removing it from house); Commonwealth v. Martinez, 47 Mass. App. Ct. 839, 842 (1999) (exigent circumstances justified police officers' warrantless entry into a hotel room following a controlled buy where police could not obtain a search warrant in advance because they did not know where the drug sale would take place and where the undercover officer was still inside the room, and possibly in danger); Commonwealth v. Lopez, 38 Mass. 748, 749-750 (1995) (exigent circumstances justified entry into defendant's apartment immediately following controlled buy where apartment was occupied by others and there was a possibility of destruction of evidence).

In Commonwealth v. Lee, 32 Mass. App. Ct. 85, 87-88 (1992), police conducted an undercover drug buy in the basement of a supermarket and then arrested one of the participants in a car as he drove away. The Court upheld the warrantless search of the basement for the currency used in the buy. There was probable cause to believe that the money was evidence of a crime. An exigency arose from several factors: the danger that the money would be dispersed in commerce through the supermarket cash registers, the likelihood that the suspects would learn of

their co-defendant's arrest, and the presumption that drug dealers know that marked money is used in undercover buys. See also Commonwealth v. Navarro, 39 Mass. 161, 164-165 (1995) (exigent circumstances permitted warrantless entry to secure apartment and allowed officer to grab pocketbook for fear of his personal safety when defendant lunged for it).

Finally, the resulting search must be related to and limited by the purpose of the warrantless entry. Marchione, 384 Mass. at 11. Where the police were in a home searching for a fleeing felon and looked under a small countertop, a gun seized from under the counter was suppressed because the scope of the exigent search was too broad. Commonwealth v. Bass, 24 Mass. App. Ct. 972, 974 (1987). In other words, you may only look in places within the premises where the object of the search could reasonably be found.

Similarly, a person's request for medical assistance does not permit a full-blown warrantless search of her home. Thompson v. Louisiana, 469 U.S. 17, 20 (1984). Where a case involves serious bodily injuries, the police may make a prompt warrantless search of the premises to see if there are victims or suspects still present, i.e., to conduct a "protective sweep." The search is limited to the time and places necessary to accomplish this purpose. If evidence is found in plain view it may be seized. If evidence of an evanescent nature, that is evidence which will dissipate quickly, such as blood or other liquid, is present it too may be seized without a warrant. Thereafter, a crime scene must be secured and a warrant obtained to search for other evidence. Thompson v. Louisiana, 469 U.S. at 20-21; Mincey,

437 U.S. at 395; Commonwealth v. Lewin (No. 1), 407 Mass. 617, 621-624 (1990).

Police may secure an area to be searched while awaiting a search warrant, but they may not begin the search until they have the search warrant in hand at the premises. Commonwealth v. Guaba, 417 Mass. 746, 752 (1994); Commonwealth v. Navarro, 39 Mass. 161, 164 (1995); Commonwealth v. Voris, 38 Mass. 377, 380-381 (1995); Commonwealth v. Alvarez, 422 Mass. 198, 210 (1996). Exigent circumstances are not required for impoundment while a warrant is being sought. Voris at n. 3. If they do begin to search, that is a warrantless search and the Commonwealth will have to justify it under one of these exceptions to the warrant requirement.

Similarly, the police may seize a closed container such as a briefcase while awaiting a search warrant; however, once the container is seized and taken under control of the police, any exigency relative to the potential loss or destruction of evidence therein ceases to exist, and a warrant must be obtained to open and search the container. Commonwealth v. Straw, 422 Mass. 756, 759 (1996).

III. PERSONS

On occasion, the warrantless search of a person may be justified in an emergency. In Commonwealth v. Skea, 18 Mass. App. Ct. 685 (1984), a police officer observed what he believed to be a marijuana cigarette and "roaches" on the console of the defendant's automobile. When asked by the officer whether the contraband was his, the defendant said

"Give me a break." The officer then searched the defendant's pockets for more controlled substances, and found a cellophane bag containing what appeared to be four diamonds. Based upon previously obtained information and on other information obtained from the defendant, including his consent to take the items, the officer seized the bag with the diamonds. 18 Mass. App. Ct. at 686. Finding no further controlled substances, the officer trampled the "joint" and the "roaches" into the ground and, in keeping with department policy regarding the seizure of small quantities of marijuana, released the defendant without arresting him. Upon further investigation, the officer confirmed that the diamonds were in fact stolen, and the defendant was arrested several weeks later for receiving stolen property. 18 Mass. App. Ct. at 686-687.

In upholding the seizure of the diamonds, the Court concluded that where police have probable cause to search a person and exigent circumstances exist, a warrantless search may be reasonable. 18 Mass. App. Ct. at 696-698. Here, the officer had probable cause to search the defendant for controlled substances. During the search he discovered other items which he had probable cause to believe were stolen. Unless the officer seized the diamonds then and there, there was a real "likelihood of imminent loss of the evidence." 18 Mass. App. Ct. at 691. Noting that the exceptions to the warrant requirement were not intended to be exclusive or rigid, the court determined that the search was proper. 18 Mass. App. Ct. at 692-701. The Court, however, seemed to put great weight on the fact that the

scope of the resulting search was limited in relation to the probable cause for controlled substances and the police otherwise acted throughout the incident with reasonableness, restraint, and high regard for the defendant's constitutional rights. 18 Mass. App. Ct. at 691; see also Commonwealth v. Owens, 414 Mass. 595, 600 (1993).

SEARCHES INCIDENT TO A LAWFUL ARREST

Upon the lawful custodial arrest of a person, the police may make a thorough warrantless search of the person and of the area within the arrestee's immediate control. The rationale for the search incident to arrest exception to the warrant requirement is the historical right of an arresting officer to search the place of arrest and the recognition that once an arrestee's privacy has been invaded by his being placed in lawful custody there is little or no additional invasion in searching him or his immediate surroundings. Generally, the purposes of the search incident to arrest are: (1) to discover and seize weapons which might be used by the arrestee to injure the officer or effect an escape and (2) to discover and seize fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made. Probable cause is not required for a search incident to an arrest. However, the search is limited by the Fourth Amendment to the United States Constitution, article 14 of the Massachusetts Declaration of Rights, and by Massachusetts General Laws c. 276, §1. See Commonwealth v. Madera, 402 Mass. 156, 158-161 (1988). The essential requirements of a search incident to an arrest are:

- a lawful arrest;
- a search of the arrestee's body, clothing, possessions and area within his immediate control;
- a search for weapons and/or evidence of the crime for which arrest is made; and
- a search substantially contemporaneous with the time and place of arrest.

I. LAWFULNESS OF THE ARREST

In order for there to be a reasonable search incident to arrest there must be a lawful arrest. Commonwealth v. Joe, 425 Mass. 99, 106-107 (1997); Commonwealth v. Frazier, 410 Mass. 235, 241 (1991); Commonwealth v. Hecox, 35 Mass. App. Ct. 227, 285 (1993). The arrest, with or without a warrant, must be supported by probable cause. Usually, though not always, the arrest will precede the search. See Commonwealth v. Alvarado, 420 Mass. 542, 551 (1995) (fact that officer searched defendant just prior to placing him under arrest was not unreasonable where probable cause to arrest arose when officer patted front of defendant's pants); Commonwealth v. Chavis, 41 Mass. App. Ct. 912, 914 (1996) (where "formal arrests followed immediately after the challenged search, it is not significant that the search preceded the arrest"). The probable cause the police must have for the arrest may not be composed of any evidence or information obtained as a result of the search. If the arrest is a mere pretext to search the arrestee for evidence of another crime then the search is invalid. For example, where the purpose of an arrest for a motor vehicle violation is to search a defendant suspected of carrying narcotics the

search is invalid. Where the police have waited one hour after a traffic offense to arrest a defendant they suspected of carrying drugs and never booked the defendant for the traffic offense the search has been held unlawful. However, the mere fact that the police suspect an arrested person of some other crime than that for which he has been lawfully arrested, will not, without more, invalidate a search incident to that arrest. Commonwealth v. Petrillo, 399 Mass. 487, 490-491 (1987). Finally, the fact that a search incident to a lawful arrest has been conducted pursuant to a standard department procedure has helped courts find that an arrest was not a pretext for a search. Commonwealth v. Gliniewicz, 398 Mass. 744, 750 (1986). If the police wait to arrest a person until he is in a place they want to search the search will be invalid.

II. SCOPE OF THE SEARCH

A. Arrestee's Person And Personal Effects In Possession.

The police may search the arrestee's person for weapons and for evidence which might be destroyed. As part of the search for weapons and evidence, the police may search articles in the physical possession of the person (e.g., briefcase, suitcase, handbag, shopping bag). See Commonwealth v. Chavis, 41 Mass. App. Ct. 912, 914 (1996) (where police arrested larceny suspect shortly after the larceny occurred, they could search the suspect for evidence of the crime and, upon finding a small box on the suspect, open the box to find jewelry); Commonwealth v. Clermy, 421

Mass. 325, 330-31 (1995) (where police had probable cause to arrest defendant for narcotics violation, and as part of search found plastic prescription container hidden in defendant's groin area, the police decision to open the container in search of evidence was a valid search incident to arrest). However, once the police take exclusive control of personal property and there is no danger the person will get access to it or destroy evidence, searches of the articles will not be justified as incident to arrest and a warrant will usually be necessary. The police may also search the arrestee's clothing and do non-intrusive body searches (e.g., nail clippings, benzidine swabs, pubic hair clippings). Commonwealth v. Tarver, 369 Mass. 302, 307-310 (1976). See also Commonwealth v. Williams, 422 Mass. 111, 115, 120 (1996) (police could properly seize clothing and shoes worn by the defendant at time of arrest); Commonwealth v. Robles, 423 Mass. 62, 66-67 (1996) (police could seize bloody coat worn by murder suspect at time of arrest where they had probable cause to believe the coat was evidence of the crime). Warrantless intrusions into the body incident to arrest (e.g., blood samples) may be reasonably done if there is a strong showing of necessity.

All of the above searches are limited by Massachusetts General Laws c. 276, §1⁶ which permits a search incident to

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APPENDIX "A"

MASSACHUSETTS GENERAL LAWS CHAPTER 276, SECTION 1

A search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee

an arrest only for the purposes of seizing fruits, instrumentalities, contraband and other evidence of the crime for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape. Thus, if a person is arrested for an offense in which it is not reasonable to expect evidence would be found on his body or clothing, or in his possessions, the scope of the search must be limited to those areas or articles which might reasonably contain a weapon. For example, in Commonwealth v. Lucido, 18 Mass. App. Ct. 941, 942-943 (1984), where the defendant was arrested for a motor vehicle violation for which there was no evidence to be found, the court held that a search of a crumpled quart-sized paper bag containing cocaine was proper because the bag might well have contained a weapon. See also Commonwealth v. Johnson, 413 Mass. 598, 602 (1992); Commonwealth v. Hampton, 26 Mass. App. Ct. 938, 941 (1988). In Commonwealth v. Harding, 27 Mass. App. Ct. 430, 438 (1989), the Appeals Court upheld the search for a weapon of

might use to resist arrest or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evidence in criminal proceedings.

The word "property" as used in this section shall include books, papers, documents, records and any other tangible objects.

Nothing in this section shall be construed to abrogate, impair or limit powers of search and seizure granted under other provisions of the General Laws or under the common law.

the interior of an arrestee's truck, after the arrestee had been secured in a police cruiser and after the police observed ammunition in the cab of the truck, because there was a "reasonable connection" between housebreaks and the carrying of weapons. Thus, the weapon sought would be evidence of the crime of burglary. In a case, however, where there is no evidence of the crime for which the defendant was arrested, G.L. c. 276, §1 would preclude a search of a container that is too small to hold a weapon. Compare Commonwealth v. Cassidy, 32 Mass. App. Ct. 160, 163-164 (1992) (no proper search incident to arrest for kidnapping where no evidence of crime was expected to be found and arrestee could not gain access to weapons to facilitate escape) with Commonwealth v. Madera, 402 Mass. 156, 161 (1988) (police may, in the absence of exigent circumstances, search a bag carried by a person whom they lawfully arrest, when they also have probable cause to believe the bag contains evidence of the crime for which the arrest is made). See also Commonwealth v. Peters, 48 Mass. App. Ct. 19, 21 (1999) (police properly searched the defendant for possession of drugs incident to his arrest for a suspended license where the police saw the defendant in a place known for drug activity and had seen him engage in what appeared to be a drug transaction).

If during the course of a search incident to arrest an officer observes incriminating evidence in plain view, it may properly be seized. Thus, if there is a permissible constitutional or statutory basis for a search, apart from the search incident to arrest exception, G.L. c. 276, §1,

does not require the exclusion of evidence seized, even though the search was also conducted incident to arrest. Commonwealth v. Toole, 389 Mass. 159, 162-164 (1983); Commonwealth v. Wilson, 389 Mass. 115, 118 (1983). There is no automatic right to pat frisk a companion in the company of one who has lawfully been arrested. Commonwealth v. Wing Ng, 420 Mass., 236, 238 (1995). If, however, the officer can point to specific articulable facts that warrant a reasonable suspicion that the companion might be armed and a potential threat to the safety of the officer or others, the companion may be frisked. Id.

B. Area Within Arrestee's Immediate Control.

Upon a lawful custodial arrest the police may search the area within the immediate control of the arrestee. This generally requires an on-the-scene judgment by the arresting officer of the likelihood of an arrestee's gaining access to a weapon or to incriminating evidence. Usually, if the person is arrested in a house or apartment, this area would extend no further than the room within which the arrest takes place. If the area within immediate control of the person is smaller, a search of the entire room would not be reasonable. The police may, however, conduct a protective sweep of the entire premises to search for other persons if such a search is reasonably necessary, based on specific and articulable facts, to effect the arrest without fear of violence. Maryland v. Buie, 110 S. Ct. 1093, 1098-1099 (1990); Commonwealth v. Walker, 370 Mass. 548, 555-558

(1976), cert. denied, 429 U.S. 943; Commonwealth v. Bui, 419 Mass. 392, 395-396 (1995) (police were entitled to act for their own safety when they entered apartment pursuant to an arrest warrant, kicked over mattress and found gun). Any weapons or evidence found in plain view during this protective sweep may be seized.

Under the Fourth Amendment a contemporaneous search of the passenger compartment of an automobile and containers therein for weapons and evidence is reasonable as a search incident to arrest if the arrestee is an occupant of the automobile. New York v. Belton, 453 U.S. 454, 460 (1981). This is true even though the arrestee is in handcuffs under guard some distance from the vehicle or seated in a nearby cruiser.

However, such a search in similar circumstances may violate G.L. c. 276, §1 and any evidence seized could be suppressed. Under G.L. c. 276, §1, if the arrestee has been handcuffed and placed in custody at a distance from the vehicle, the police may not validly search any part of the vehicle for weapons. This is because the arrestee could not have access to the vehicle in order to obtain a weapon with which to resist arrest or effect an escape. Commonwealth v. Toole, 389 Mass. 159, 162-164 (1983); Commonwealth v. Rose, 25 Mass. App. Ct. 905, 906 (1987); Commonwealth v. Lucido, 18 Mass. App. Ct. 941, 942 (1984). Likewise, police may not search an arrestee's automobile when the individual was apprehended away from his car and already in his apartment at the time of the search. Commonwealth v. Santiago, 410 Mass. 737, 742-744 (1991). The police may however search

the passenger compartment of a motor vehicle in which the arrestee has been an occupant to recover evidence of the crime for which the arrest is made. See Commonwealth v. Ford, 35 Mass. App. Ct. 752, 756 (1994). Contrast Commonwealth v. Amendola, 26 Mass. App. Ct. 713, 716 (1989) (search of car and its trunk was not valid incident to arrest because arrestee was merely next to car, was not seen entering car or trunk, nor was trunk within his reach). A search may also be justified if the police have probable cause to search the car and there are exigent circumstances which would justify the failure to obtain a warrant. Commonwealth v. Brillante, 399 Mass. 152, 155 (1987); Commonwealth v. Bongarzone, 390 Mass. 326, 351-352 (1983). In addition, the police may conduct a protective sweep of a vehicle from which an arrestee has been removed for weapons that other passengers in the vehicle might use to retaliate against the arresting officer or assist the arrestee to escape. Commonwealth v. Lucido, 18 Mass. App. Ct. at 942; Commonwealth v. George, 35 Mass. App. Ct. 551, 555 (1993) (arrestee's evasive replies and sudden movement of gym bag entitled police to search it for weapon during operating after suspension arrest). Finally, the police may take a vehicle into custody if they have arrested the occupant, and if it is not reasonable to abandon the vehicle or release it to another person, and may then conduct an inventory of the contents of the vehicle in accordance with standard, written department procedures for such cases.

III. THE TIME AND PLACE OF THE SEARCH

The search of an arrestee must be conducted at the time of the arrest. It is permissible to do a cursory pat-down of a subject at the scene of a public arrest and to then conduct a more thorough search at the police station. Commonwealth v. Battle, 365 Mass. 472, 475 (1974). This is justified on the basis of avoiding undue embarrassment to the arrestee. If the police have probable cause to arrest and they intend to arrest the subject, they may search the subject's person prior to the arrest, as long as they do arrest the suspect immediately after the search and the fruits of the search form no part of the justification for the arrest. See Smith v. Ohio, 110 S. Ct. 1288, 1290 (1990).

Consistent with the reasonableness of a search of the area within the immediate control of the arrestee the police may not arrest a person on the front steps of a house and then search the house incident to the arrest. Similarly, if the arrest occurs inside a house the police may not search a car in the driveway. If the arrest takes place at the police station the police may not search the arrestee's vehicle in the parking lot incident to that arrest. Usually, if the police have taken an arrestee into custody and have transported his vehicle to the police station they may not search the vehicle incident to the arrest. See e.g. Commonwealth v. Alvarado, 420 Mass. 542, 554 (1995) (where defendant had been arrested and booked, vehicle search 2 hours after it was towed to police barracks was

unreasonable). This is because the arrestee no longer has access to the vehicle or any weapons or evidence in it.

INVENTORY SEARCHES

I. AUTOMOBILES

Pursuant to standard police department procedures, an officer may conduct an inventory search to recover and secure valuables within a vehicle lawfully in police custody. An inventory search is conducted for three reasons: (1) to protect the vehicle and its contents; (2) to protect police against unfounded charges of misappropriation of property; and (3) to protect the public from the possibility that the car might contain weapons or dangerous contraband which might fall into the hands of vandals. South Dakota v. Opperman, 428 U.S. 364, 369 (1976); Commonwealth v. Daley, 423 Mass. 747, 750 (1996); Commonwealth v. Matchett, 386 Mass. 492, 510 (1982). To be lawful, an inventory search must satisfy four conditions:

- the vehicle must be lawfully in police custody;
- the search must be made pursuant to standard, written police procedures. Commonwealth v. Bishop, 402 Mass. 449, 451 (1988); Florida v. Wells, 110 S. Ct. 1632, 1635 (1990);
- the inventory search may not be a pretext concealing an investigative motive; and
- the search must be reasonable under the circumstances. Opperman, 428 U.S. at 364; Commonwealth v. Wilson, 389 Mass. 115, 116-117 (1983); Colorado v. Bertine, 479 U.S. 367, 374 (1987).

A. Vehicle Lawfully In Police Custody

A lawful seizure is a prerequisite to a valid inventory search. Several of the most common circumstances under which police may properly take custody of a vehicle are discussed below.

1. Abandoned Vehicles.

General Laws c. 90, §22C sets standards by which a vehicle appearing to be abandoned may be removed from public or private ways and private property. Briefly, an officer having charge of the public ways may take possession of a vehicle apparently abandoned by its owner which has been left standing for more than seventy-two hours on a public or private way or any property without the permission of the owner or lessee.

2. Impoundment Incident To Arrest.

After arresting the operator, a vehicle may be impounded if reasonably necessary to ensure its safety. For example, the police would be justified in towing a vehicle from an area prone to vandalism or theft and which might contain items likely to be stolen or destroyed. United States v. Balanow, 528 F.2d 923, 924 (7th Cir. 1976). Where the department's written inventory policy provides for the impoundment of a motor vehicle upon the arrest of the operator, police would also be justified in conducting an inventory search of a motor vehicle impounded even after a routine traffic stop which resulted in the defendant's arrest for outstanding warrants. Commonwealth v. Raedy, 24 Mass. App. Ct. 648, 652 (1987). But if the vehicle is located where it is ordinarily parked (e.g., a garage, place

of business or residence), the police cannot justify its impoundment, because the operator normally exposes the vehicle to the risks of parking in that area. United States v. Squires, 456 F.2d 967 (2d Cir. 1972).

In Dyke v. Taylor Implement Mfg. Co., Inc., 391 U.S. 216, 221 (1968), after police arrested a motorist, they drove his vehicle to the courthouse as a favor. After parking the car, the police searched it. The Supreme Court held that the search was unlawful because the police did not impound the vehicle after the arrest. Rather, the vehicle was driven to the courthouse merely to make it more convenient for the defendant upon his release.

The Supreme Judicial Court has held that a defendant does not necessarily have to be under arrest in order for the police to validly impound a vehicle. In Commonwealth v. Daley, 423 Mass. 747, 750 (1996) the police stopped an unregistered, uninsured vehicle that had attached plates belonging to another vehicle. The operator was not arrested. The Court held that "the fact that the defendant was not under arrest is irrelevant to the propriety of the impoundment" where the defendant could not continue with the lawful operation of the vehicle on a public roadway. Moreover, the Court in Daley also held that impoundment was proper even where the defendant had the money to pay a tow truck operator to tow the vehicle to the destination of the defendant's choice. "The interests protected by an inventory search are what give rise to the officer's obligation to search an impounded vehicle, regardless of its ultimate destination when towed." Id. at 751.

3. Illegally Parked And Unsafe Vehicles.

The Supreme Court has held that the "authority of police to seize and remove vehicles impeding traffic or threatening public safety and convenience is beyond challenge." Opperman, 628 U.S. at 369. Inventory searches have been upheld after a vehicle is impounded for double parking, Commonwealth v. Tisserand, 5 Mass. App. Ct. 383, 386 (1977); after receiving multiple parking violation notices, Opperman, 428 U.S. at 366; when creating a traffic hazard, Cady v. Dombrowski, 413 U.S. 433, 441 (1973); and when parked in the parking lot of a private business after the driver was arrested for drunk driving, Commonwealth v. Dunn, 34 Mass. App. Ct. 702, 706 (1993).

In Cady v. Dombrowski, police towed a disabled vehicle after arresting the operator for operating under the influence of alcohol. Police knew that the motorist was a Chicago police officer and that police department regulations required an officer to carry a pistol at all times. After police searched the defendant incident to arrest and found no pistol, they conducted an inventory search of his vehicle and inadvertently discovered evidence of a homicide. The Court upheld the search, because the vehicle was impeding traffic before its removal, it might have contained a weapon, and the search was conducted pursuant to standard procedures. 413 U.S. at 440-441.

4. Vehicles Subject To Forfeiture Or Which Constitute Evidence Of Crime.

The most obvious but perhaps the least frequent situation giving rise to police custody of a vehicle occurs

when the vehicle itself is evidence of a crime or when it is seized pending forfeiture, e.g., pursuant to G.L. c. 94C, §47(f) (impoundment proper upon a showing of probable cause that vehicle is used to transport drugs). Assuming a lawful seizure based upon probable cause, the vehicle may be impounded and an inventory search conducted. See Cooper v. California, 386 U.S. 58, 61-62 (1967) (inventory search of a car lawfully impounded pending forfeiture held permissible).

B. Search Conducted Pursuant To Standard Police Procedures

An inventory search constitutes a caretaking function rather than a criminal investigation designed to uncover evidence. Neither probable cause nor a warrant is required. Opperman, 428 U.S. at 370 n.5; Illinois v. Lafayette, 462 U.S. 640, 643 (1983). However, to guard against arbitrariness and to ensure that the search will be limited in scope to the extent necessary to carry out the caretaking function, an inventory search must be conducted pursuant to regularized, written police department procedures. Opperman, 428 U.S. at 369; Bishop, 402 Mass. at 451; Wilson, 389 Mass. at 117. The police must be able to establish that a search is routinely conducted in every instance that a vehicle is impounded. Wilson, 389 Mass. at 117. An inventory search pursuant to department regulations which are only occasionally followed is unlawful. See Commonwealth v. DeVlaminck, 32 Mass. App. Ct. 980, 981 (1992).

The testimony of a police officer that his personal policy is to inventory the contents of a seized vehicle will not be sufficient to prove a standard inventory procedure where the police department's regulations do not require that all officers conduct inventory searches. Thus, evidence found while securing valuables in a vehicle's trunk -- the usual practice of the officer ordering the tow -- was not admissible in court as the inventory was not a standardized department procedure. Commonwealth v. Ford, 394 Mass. 421, 426 (1985). If, however, the police department has a written policy which expressly states that the person who requests that the car be towed must take responsibility for securing from the car "any monies or articles of value that cannot be secured by the tow company," the police may search the vehicle's trunk and passenger compartment for such valuables to be inventoried. Commonwealth v. Garcia, 409 Mass. 675, 681 (1991).

In Commonwealth v. Daley, 423 Mass. at 751, after the defendant requested that his vehicle be towed to an alternate location at his expense, the officer conducted the inventory roadside while waiting for the tow truck to arrive. The Court found the roadside inventory proper because the department's written inventory policy required that an inventory be conducted in all cases "when it is the police who cause the compulsory towage of an impounded vehicle." Id.

C. Search Must Not Be A Pretext For An Investigation

The inventory must be a good faith search to locate and secure valuables; it cannot be used to conceal an

exploratory search for incriminating evidence. Commonwealth v. Hason, 387 Mass. 169, 178 (1982); Matchett, 386 Mass. at 510; Commonwealth v. Alvarado, 420 Mass. 542, 553 (1995). A search of an impounded vehicle locating marijuana was not upheld where clothing and other valuables were left unprotected in the car. In these circumstances, the court held that the search was designed to locate and seize contraband rather than to protect property. See Commonwealth v. Alvarado, 420 Mass. 542, 553 (1995) (use of canine for detection of controlled substances made it clear that search of vehicle was of investigatory nature and not inventory search). State v. McDougal, 68 Wisc. 2d 399 (1975). The mere fact, however, that the searching officer suspects that evidence or contraband is contained in the car will not invalidate the inventory search if there is no suggestion that the impoundment was a subterfuge for conducting an investigatory search. Tisserand, 5 Mass. App. Ct. at 386; Matchett, 386 Mass. at 510.

D. Reasonableness Of The Search

1. Impounding The Vehicle Must Be Reasonable.

The United States Supreme Court, upholding an inventory search in South Dakota v. Opperman, 428 U.S. at 375, noted that the seizure of an illegally parked vehicle was proper where the owner was not present to make alternative arrangements for its removal. See, e.g., United States v. Wilson, 636 F.2d 1161, 1163 (8th Cir. 1980); State v. Phifer, 297 N.C. 216 (1979). To avoid potential disputes, it is suggested that reasonable efforts be made, where

practicable, to advise the owner of the need to secure or remove their vehicle, and that it will be impounded only after the owner fails to make alternative arrangements or consents to the seizure. However, circumstances may require police to forego contact with the owner. For example, if police impound an abandoned vehicle, they need not contact the owner first. If an operator is highly intoxicated, mentally incompetent, injured, or combative, discussions will likely be futile. Similarly, exigent circumstances may require that police remove a vehicle obstructing traffic or endangering public safety without first notifying the owner. See also Commonwealth v. Caceres, 413 Mass. 749, 752 (1992) (driver arrested, passenger unlicensed; inventory search valid).

2. Scope Of The Search Must Be Reasonable.

An inventory search may extend only into those portions of the vehicle where property of the owner or occupant can reasonably be expected to be found. United States v. Edwards, 577 F.2d 883, 893-894 (5th Cir. 1978). This can clearly include all open areas, including the area under the seats, the unlocked glove compartment, and other places where property is likely to be located. Commonwealth v. Figueroa, 412 Mass. 745, 749 (1992).

The United States Supreme Court has also held in Illinois v. Lafayette, 462 U.S. at 646, that the contents of all containers and packages in the possession of the arrestee, such as suitcases and bags, may also be properly inventoried. The Court reasoned that while the police could secure the entire container, there is no requirement that

the police resort to less intrusive means to safeguard the owner's property. Moreover, if the police secured the entire container, there would be no record of the contents and, accordingly, the police would not have any means to verify what property was actually present. 462 U.S. at 648. Article 14 of the Massachusetts Declaration of Rights also requires that all inventories of closed containers be conducted in accordance with standard, written procedures. Bishop, 402 Mass. at 451. But see Commonwealth v. Alvarado, 420 Mass. 542, 553 (1993) (where search exceeded scope of permissible inventory search when police removed coffee maker from box, opened water well, and removed bag from water well and opened it).

Moreover, while there have been conflicting opinions regarding the trunk and locked glove compartments, the police may choose to inventory the contents of these areas as well in order to protect themselves against unfounded charges of misappropriation of property. See Commonwealth v. Caceres, 413 Mass. 749, 754 (1992). However, an inventory search may not extend to hidden places, and does not allow the removal of car parts to locate concealed contraband. People v. Andrews, 6 Cal. App. 3d 428 (1978). Items are not admissible in court which are found in an inventory search wedged behind the back of the front seat, State v. McDaniel, 156 N.J. 347 (1978), or inside zipped seat covers, People v. Tutovic, 566 P.2d 705 (Colo. 1977).

II. PERSONS

An inventory search of an arrestee at the station house is valid if (1) the person searched is lawfully under arrest

and about to be incarcerated; (2) the search is conducted pursuant to standard, written police procedures; and (3) the conduct and scope of the search is in all respects "reasonable."

After a person has been arrested and brought to the station house, it is permissible for the police to conduct a warrantless and extensive inventory search, pursuant to standard, written police procedures, of the arrestee's person and personal effects incident to booking and jailing the suspect. An inventory search serves four valid purposes: to protect the arrestee's property while he is in jail; to protect the police from fraudulent claims that they have stolen or failed to adequately safeguard the arrestee's property; to discover objects that may be used to facilitate an escape or which might be used by the arrestee to injure himself; and to ascertain or verify the identity of the arrestee. Illinois v. Lafayette, 462 U.S. at 646; Commonwealth v. Benoit, 382 Mass. 210, 219 (1987); Commonwealth v. Ross, 361 Mass. 665, 680-681 (1972).

It is not permissible for the police to conduct an inventory search for the purpose of gathering incriminating evidence; such an inventory would be considered a pretext for a search. However, if incriminating evidence is inadvertently discovered during a valid inventory search, the evidence will be admissible against the arrestee if the inventory search was "reasonable."⁷

⁷ Police may also conduct a search incident to arrest at the station even though the arrest took place elsewhere. United States v. Edwards, 415 U.S. 800, 803 (1974); see also Commonwealth v. Brown, 367 Mass. 24, 33-34 (1975);

A. Person Lawfully In Police Custody

Simply put, if the arrest is unlawful any subsequent inventory search of the arrestee's person is invalid.

The Supreme Court has indicated that an inventory search of an arrestee's personal effects is proper only if the arrestee "is to be jailed." Illinois v. Lafayette, 462 U.S. at 646. (That assumes, of course, that the arrest was lawful in the first place.) If the police make an administrative decision not to detain an arrested person, or if the arrestee has a right to be released, a detailed inventory search would probably be considered unnecessary and constitutionally unreasonable. See State v. Carner, 624 P.2d 204, 208 (Wash. App. 1981) (because police decided not to detain juvenile arrested for traffic violation, it was unreasonable to conduct body search for items which would aid in escape). Such a search would not fulfill the purposes of an inventory search. Police may conduct an inventory search of a person held in protective custody pursuant to G.L. c. 111B, 8. See Commonwealth v. O'Connor, 406 Mass. 112, 118 (1989).

B. Search Conducted Pursuant To Standard Police Procedure

Because an inventory search of an arrestee's person is usually a routine administrative step following arrest and preceding incarceration, the justification for such searches

Commonwealth v. Battle, 365 Mass. 472, 476 (1974);
Commonwealth v. Bowlen, 351 Mass. 655, 657 (1967).

does not rest on probable cause to believe that certain items will be found on the arrestee. Illinois v. Lafayette, 462 U.S. at 643. Thus, arbitrariness and police discretion in the inventory search area are not constrained by probable cause, but rather by requiring the establishment of a written, routine procedure within the police department mandating inventory searches of all arrestees prior to incarceration. 462 U.S. at 646; Ross, 361 Mass. at 680-681; see Commonwealth v. Matchett, 386 Mass. 492, 509-510 (1982) (vehicle inventory searches must be pursuant to standard police procedure); Commonwealth v. Ferguson, 410 Mass. 611, 616 (1991) (policy for inventory of arrestee's person must be in writing); Commonwealth v. Bishop, 402 Mass. 449, 451 (1988) (standard police procedures outlining inventory searches must be in writing).

It is very important that police conduct inventory searches pursuant to standard, written procedures. In Commonwealth v. Ford, 394 Mass. 421 (1985)⁸, the defendant was arrested on an outstanding default warrant and his car impounded. While removing the defendant's keys from the car before it was towed, the officer noticed some audiotapes on the front seat floor. In order to safeguard the defendant's property, the officer opened the trunk and placed the tapes inside. As he did so, he saw a rifle in plain view. Id. at

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While Ford dealt with an inventory search or "storage" search of an automobile rather than of an arrestee's person, it nevertheless helps to shed light on what makes any inventory search "standard" and how the standard nature of the search can be proven.

422-423. The court held that although it was clear that the officer was attempting to protect the defendant's property and was not engaged in a criminal investigation, the search was unlawful because it was not conducted pursuant to standard police procedure. Id. at 426. The court noted that the officer who conducted the search testified at the suppression hearing that the Watertown police did not have any "specific procedure" or "set policy" for securing an arrestee's personal property. Instead, the searching officer testified that it was his own practice and that of other officers to secure personal property in a car's trunk. Id. at 423. The court concluded that because there was no standard procedure, the decisions whether and where to secure personal property were left to the officer's discretion. Id. at 427.

Article 14 requires that all standard inventory procedures be contained in a written policy statement. In Commonwealth v. Bishop, evidence seized during the inventory of a closed container found within the defendant's vehicle was suppressed where the state police did not include in their written inventory policy standards governing the inventory of closed containers. Bishop, 402 Mass. at 451. Similarly, where the police department does not have a written policy expressly allowing the police to inventory the contents of an arrestee's purse, or similar closed container, the police may not inventory the contents of the purse. Commonwealth v. Rostad, 410 Mass. 618, 620 (1991).

An inventory search is conducted pursuant to a standard procedure only if the practice is uniformly and consistently

followed throughout a particular police department. Rostad, 410 Mass. at 620. Evidence that inventory searches are only occasionally or randomly performed, or that the decision to conduct such searches is within the discretion of an individual officer, would probably preclude a finding that the inventory process is part of a standard procedure. See Commonwealth v. Gliniewicz, 398 Mass. 744, 750 (1986) (defendant's blood stained boots seized pursuant to official policy before defendant placed in cell). But see Commonwealth v. Peters, 48 Mass. App. Ct. 15, 20-21 (1999) (Commonwealth did not sustain its burden of proving lawful inventory search where the written policy allowed police to search "anything" because it "unacceptably invited the exercise of police discretion").

C. The Reasonableness Standard: The Permissible Scope Of The Search And The Significance Of The Availability Of "Less Intrusive Means"

The two most successful challenges to the reasonableness of an inventory search of an arrestee incident to incarceration have been that the scope of the search was impermissibly broad and that there were less intrusive means available to safeguard the arrestee's property. Both challenges have usually been made in cases where the police inventoried the contents of a container carried on or by an arrested person. Both challenges were addressed by the United States Supreme Court in Illinois v. Lafayette, 462 U.S. 640 (1983).

In Lafayette, the defendant was taken to the police station after he was arrested for disturbing the peace. The defendant carried a purse-type shoulder bag to the station. After the defendant was brought to the booking room, he was ordered to empty his pockets and place the contents on the counter. He then placed his shoulder bag on the counter. The officer removed and inventoried the contents of the bag, finding ten amphetamine pills inside a cigarette case package. 462 U.S. at 641-642. The officer later testified at a pretrial suppression hearing that he examined the bag's contents because it was standard procedure to inventory everything in the possession of the arrested person. 462 U.S. at 642.

Concluding that the lower court erred in suppressing the pills, the Court held that it was not unreasonable for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession. 462 U.S. at 648. The Court believed that "every consideration of orderly police administration benefiting both police and the public points toward the appropriateness of the examination of [the] shoulder bag prior to . . . incarceration". 462 U.S. at 647.

The Lafayette Court also rejected the defendant's "less intrusive means" argument. Although the searching officer testified that the shoulder bag and its contents could have been protected by merely sealing the bag and placing it in a secured locker, the Court held that the existence of such less intrusive means is not dispositive. 462 U.S. at 648.

It would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit. 462 U.S. at 648.

It is clear, therefore, that under Lafayette, the police may inventory, pursuant to standard police procedure, all packages, containers, and articles in the possession of the arrested person and catalog their contents before securing the property.¹⁰ The police procedures relied upon must be in writing and must include specific standards for the inventory of closed containers. Bishop, 402 Mass. at 451.

Further, the fact that the size, nature, or characteristics of the article or container may indicate that it is not normally used to hold valuables does not appear to affect the officer's authority to conduct an inventory of its contents. In Lafayette, for example, the pills were found in a cigarette package, an unlikely place to store valuables or contraband.

Regarding the general scope of an inventory search of an arrestee's person, the Court in Lafayette indicated that an inventory search can be at least as extensive and perhaps

¹⁰ See also Commonwealth v. Ross, 361 Mass. 665, 681 n.7 (1972) (suggesting that inventory of contents of suspect's wallet is permissible); Commonwealth v. Wilson, 389 Mass. 115, 117 (1983) (inventory of defendant's wallet prior to incarceration valid under G.L. c. 127, §3, requiring inventory by keepers of jails). But see Commonwealth v. Bishop, 402 Mass. 449, 451 n.1 (1988) (refusing to decide whether search of closed container pursuant to written, standard police procedures satisfies Article 14).

more extensive than the scope of a search incident to an arrest. Lafayette, 462 U.S. at 645. Therefore, a full body search of an arrestee prior to incarceration for the purpose of inventorying his personal effects is permissible, if conducted pursuant to a written, standard police procedure.

In Commonwealth v. Sullo, 26 Mass. App. Ct. 766, 769 (1989), the Massachusetts Appeals Court held that a police officer's reading of the backs of business cards found in a card holder in an arrestee's possession went beyond the permissible limits of an inventory (custodial) search. The problem in this case was that, according to the Court, the police officer was "hunting for information," beyond what was necessary for a lawful inventory.

ADMINISTRATIVE SEARCHES

Another exception to the warrant requirement is the warrantless administrative inspection. The United States Supreme Court recognizes an administrative inspection as an exception to the warrant requirement of the Fourth Amendment; the Supreme Judicial Court recognizes it as an exception to the warrant requirement of art. 14 of the Massachusetts Constitution. An administrative inspection is a search conducted pursuant to statute or administrative regulation. It usually concerns "closely regulated" business premises. Examples of such permissible warrantless administrative searches include a fire department's inspection of a house immediately after a fire was extinguished to investigate the cause and survey the damage, Commonwealth v. Jung, 420 Mass. 675, 681-683 (1995); fire inspection of a commercial warehouse, See v. Seattle, 387

U.S. 541 (1967); inspection of the business premises of a liquor licensee, Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); search of a licensed gun dealer's storeroom, United States v. Biswell, 406 U.S. 311, 316 (1972); inspection of mines under the Federal Mine Safety and Health Act, Donovan v. Dewey, 452 U.S. 594, 603 (1981); search of an automobile junkyard and vehicle-dismantling business, New York v. Burger, 482 U.S. 691, 700-702 (1987); inspection of a motel guest register under G.L. c. 140, §27, Commonwealth v. Blinn, 399 Mass. 126, 129 (1987); inspection of an automobile body shop under G.L. c. 140 §§66 and 67, Commonwealth v. Eagleton, 402 Mass. 199, 201-202 (1988); inspection of a fishing vessel for a fishing permit under G.L. c. 130, §80, Commonwealth v. Tart, 408 Mass. 249, 253-254 (1990); and inspection of the firearm dealers' records and inventory logs. G.L. c. 140, §123. See also Commonwealth v. Frodyma, 386 Mass. 434, 437-438 (1982), S.C., 393 Mass. 438 (1984); Commonwealth v. Lipomi, 385 Mass. 370, 380 (1982); Commonwealth v. Accaputo, 380 Mass. 435, 441 (1980) (regarding searches of pharmacies pursuant to administrative search warrants).

However, a warrantless search of an auto body shop pursuant to G.L. c. 90, §32 was not a reasonable administrative inspection, where there was no statutory limit on the time, place, and scope of the inspection so as to restrain the discretion of the investigating officer, and where there were no standard agency procedures governing such searches that would have minimized the element of

discretion. Commonwealth v. Bizarria, 31 Mass. App. Ct. 370, 377 (1991).

The rationale behind permitting warrantless administrative searches is that an operator of a licensed business or one that is "closely regulated" has a reduced expectation of privacy that is outweighed by the government's need to conduct warrantless inspections in particular circumstances. The regular and systematic conduct of such searches pursuant to clear statutory or regulatory guidelines provides the neutral and non-discretionary aspects a search warrant usually ensures. See Commonwealth v. Eagleton, 402 Mass. at 201-202.

The constitutionality of warrantless administrative searches of "closely regulated" industries depends on the existence of three criteria. First, the state must have a "substantial" interest in the regulatory scheme which calls for the administrative search. Second, the warrantless inspection must be necessary to further the regulatory scheme. Finally, the statute's inspection provision, in terms of certainty and regularity, the time, place, and scope, of its application must provide a constitutionally adequate substitute for a warrant. Tart, 408 Mass. at 253-254. It is strongly recommended that, prior to conducting a warrantless administrative search, police officers consult with the District Attorney's office.

ROADBLOCKS

Both the United States Supreme Court and the Supreme Judicial Court of Massachusetts have held that police may use roadblocks to stop motorists, if conducted under certain

well-defined conditions. To be lawful, roadblocks must be in writing, planned by supervisory personnel, and their use (though not their specific location) should be publicized in advance. Additionally, police should ensure safety by locating the roadblock in a well-lighted area with sufficient uniformed police officers, warning lights, and signs. The officer in the field operating the roadblock must have no discretion as to which vehicles are stopped, and the degree of motorist inconvenience must be minimal. Michigan v. Sitz, 110 S. Ct. 2481 (1990); Commonwealth v. Anderson, 406 Mass. 343, 348-349 (1989); Commonwealth v. Cameron, 407 Mass. 1005, 1006 (1990). Planners must locate the roadblock in a problem area "where accidents or prior arrests for drunken driving have occurred." Commonwealth v. Trumble, 396 Mass. 81, 92 (1985). The guidelines for a specific roadblock must set forth in writing recent alcohol-related incidents in the area. Commonwealth v. Donnelly, 34 Mass. App. Ct. 953, 954 (1993).

The standards for roadblock planning and supervision must be rigidly observed and documented. In Commonwealth v. Trumble, supra at 92-94, the Court upheld the use of a well-defined and strictly supervised roadblock. But in other recent cases, the state failed to produce sufficient evidence of a supervisory plan and so the roadblocks were unconstitutional. Donnelly, supra; Commonwealth v. Amaral, 398 Mass. 98, 100 (1986). Thus, crucial to the validity of any roadblock, in addition to the requirement that it be conducted in a safe and reasonable manner, is that a system of supervision be in place beforehand and the discretion of

the officers conducting the roadblock be limited. It is not enough that there be "substantial compliance" with established roadblock guidelines; strict adherence to the guidelines is mandatory to ensure that the motor vehicle stops deemed lawful. Cameron, 407 Mass. at 1006; Commonwealth v. Anderson, 406 Mass. at 348-349.

SCHOOL SEARCHES

In certain limited situations, school officials need not obtain a warrant before searching a student who is under their authority. Legality of the search will depend upon the reasonableness, under all the circumstances, of the search. Reasonableness requires that the action be justified at its inception and that the search be related in scope to the circumstances which justified the interference in the first place.

Ordinarily, a school official will be justified in searching a student when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules and regulations of the school. The search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. New Jersey v. T.L.O., 469 U.S. 325, 342 (1985); see also Commonwealth v. Snyder, 413 Mass. 521, 528-530 (1992).

In the T.L.O. case, a teacher found two girls smoking in a high school lavatory in violation of a school rule. A vice principal spoke to one of the girls, T.L.O., a

14-year-old freshman. T.L.O. denied smoking in the lavatory and denied that she smoked at all. The vice principal then opened T.L.O.'s purse, removed a pack of cigarettes and accused T.L.O. of having lied to him. The vice principal also saw a package of cigarette rolling papers which, in his experience, were associated with marijuana use. Suspecting that further evidence of drug use would be found in the purse, the vice principal thoroughly searched the purse. He found a small amount of marijuana and various items indicative of the sale and use of marijuana. The vice principal called T.L.O.'s mother and gave the evidence of drug dealing to the police. At the request of the police, T.L.O. and her mother went to police headquarters where T.L.O. confessed to drug dealing. T.L.O. was found delinquent in state juvenile court and the U.S. Supreme Court ultimately upheld the search and affirmed the delinquency adjudication. The Court justified excepting school searches by school officials from the warrant and probable cause requirement by reference to the special need for a speedy response to behavior that threatens either the safety of school children and teachers or the educational process itself.

In Commonwealth v. Carey, 407 Mass. 528, 536 (1990), the Supreme Judicial Court decided that, under the circumstances of that case, the warrantless search of a high school student's locker by school officials was justified and permissible under the United States Constitution. On a Monday, two students at Woburn High School told a teacher that the defendant, a senior, had just shown them a gun he

had brought to school because of a fight that occurred on the previous Friday. The teacher promptly told the information to an assistant principal but, rather than mentioning the students' names, the teacher said he knew them from having them in his class for six months and felt they were reliable. The assistant principal and two other administrators decided to search the defendant, and if he did not have the gun on his person, to search the places he had been, and then to search his locker. The administrators had followed those steps on prior occasions when they believed a student had brought contraband to school. 407 Mass. at 529-530.

However, due to their concerns for the safety of the approximately 1,300 students and employees, the administrators also called the police. The motion judge found that the police had no input into the administrators' plan. A Woburn police detective arrived shortly thereafter and, with the administrators, questioned the defendant. A search of the defendant and his most recent whereabouts did not turn up the gun. One of the administrators searched the defendant's locker and found a sawed-off .22 caliber rifle, a gun sight, a black powdery substance, and a bullet and turned them over to police. When the detective questioned him, the defendant admitted possession of the items. 407 Mass. at 530.

Such a search must be reasonable in all the circumstances to be valid under the Fourth Amendment. Reasonable suspicion of wrongdoing is a "common-sense conclusion about human behavior upon which practical people

are entitled to rely." 407 Mass. at 534. The facts of Carey met this standard, the court said, if not the higher standard of probable cause.

The court first discussed the circumstances in which a student might not have a "legitimate expectation of privacy" in a school locker, and thus, the Fourth Amendment would not apply to a search of the locker. 407 Mass. at 531-533. The question "whether society is willing to recognize that expectation as reasonable" depends on several factors, for example, whether the lockers are school property made available to students for the limited purpose of storing items legitimately on school premises, whether the student shares joint custody of the lockers with school administrators, whether administrators retain the combination or a master key and, thus, a right of access. The court felt it important, finally, whether or not the school has a policy making school lockers subject to search and whether students are given advance notice of the policy. In the absence of such evidence, the Carey court did not decide this issue. More recently, however, the Supreme Judicial Court upheld a locker search where a written school policy informed students that lockers were subject to search, and administrators had reliable information from a named student who saw the defendant sell marijuana. Commonwealth v. Snyder, 413 Mass. 521, 526-529 (1992).

Where police were not involved in formulation of the school administrators' plan or in the search, the Carey Court held that school officials may search based on a mere reasonable suspicion. 407 Mass. at 534-535 & n.4. "A

student's direct statement to a person in authority, indicating personal knowledge of facts which establish that another student is engaging in illegal conduct, may provide school authorities reasonable grounds to search the second student's locker." 407 Mass. at 534. The administrators knew of the prior altercation said to be the reason for the gun. The search of the defendant and investigation of his trail did not produce the gun. The subsequent search of his locker was based on common sense and reasonable at its inception and in its scope.

In the collegiate context, dormitory rooms constitute a "home away from home," and are entitled to the privacy protections of the Fourth Amendment. There is no constitutional violation when university officials enter a dorm room pursuant to a "residence hall contract" with the student to inspect for health or safety hazards. But when the police are involved, and are looking for evidence of a crime, the police must have either probable cause and a warrant, express consent, or exigent circumstances. Commonwealth v. Neilson, 423 Mass. 75, 78 (1996) (where college officials found marijuana plants in a dorm room while conducting an administrative inspection, the police should have obtained a warrant before entering to seize the plants).

Train4

PREPARATION AND EXECUTION OF SEARCH WARRANTS

I. INTRODUCTION

The following is meant to serve as a step-by-step guide in the preparation of applications for search warrants, the execution of warrants once obtained, and the return of warrants following execution. This guide is designed to track the search warrant form used in all counties across the Commonwealth. A photocopy of the form is attached to these materials, the numbers and letters on the form corresponding to the instructions set forth in Section II of this guide. The forms may be obtained from your local District Court Clerk or this office.

Police officers are encouraged to consult with the local district attorney's office for assistance in obtaining a search warrant. In Middlesex County, police officers in need of such assistance may call (during the day) the Appeals and Training Bureau at (617) 494-4672 or (on nights and weekends) the duty line at (617) 430-1520. If there is no answer on the duty line, please call 1-617-430-1522 from a touch tone phone and enter your telephone number.

II. PREPARATION OF THE FORMS

A. Application For The Search Warrant

1. State the department of the Trial Court from which the warrant is to be issued. This will either be "Superior" or "District". In a District Court warrant the appropriate division of the District Court, e.g., Cambridge Division, should be inserted. A search warrant may be issued for a premises anywhere in the Commonwealth by a Superior Court judge. A District Court judge, a

clerk-magistrate or an assistant clerk-magistrate for the district where the offense occurred may issue a search warrant concerning that offense for premises anywhere in the Commonwealth. G.L. c. 218, §§33, 35; G.L. c. 276, §§1, 3A.¹ If a search warrant is sought after business hours, the affiant should call the state police general headquarters at (508) 820-2121 in order to get in contact with the judge on duty. The after-hours judge, even though he may be a District Court judge, is usually vested with the authority of a Superior Court judge when on duty. Thus, the duty judge may issue a warrant to search anywhere in the Commonwealth.

Note, however, that only a judge has the authority to issue a warrant to search a person's body cavity. Rodrigues v. Furtado, 410 Mass. 878, 888 (1991). Officers seeking to conduct any sort of invasive search of a person's body are advised to get authority from a District Court or Superior Court judge, after consulting with an Assistant District Attorney. This is also true for warrants seeking the removal of a blood sample from a person as such a warrant may only issue following a hearing. In the Matter of Lavigne, 418 Mass. 831, 834-836 (1994).

2. State the affiant's name.

3. State the affiant's rank, specialized unit (if any), and law enforcement agency, e.g., "Detective, Reading

¹ Technically, justices of the Supreme Judicial Court have the authority to issue search warrants, but as a practical matter they are not called upon to do so.

Police Department" or "Sergeant, Diversion Investigative Unit, Massachusetts State Police."

In some circumstances, it may be advisable to establish that the officer has the authority to investigate the crime for which the search warrant is issued. If the crime is outside the territorial or substantive jurisdiction of the officer applying for the search warrant, he may be in no better position to seek a warrant than a private citizen. The jurisdiction of the following departments are set forth in the listed statutes:

- a. Department of State Police - G.L. c. 22C, §2, G.L. c. 147, §2. (These provisions govern the former metropolitan district commission police force, the capitol police force, the division of law enforcement of the registry of motor vehicles and the division of the state police force, as the four forces have been consolidated into the Department of State Police. St. 1991, c.412, §1.)
- b. Local Police Departments - G.L. c. 41, §98
- c. M.B.T.A. Police - St. 1968, c. 664
- d. Railroad Police - G.L. c. 159, §93
- e. College & University Police - G.L. c. 22C, §63

If the crime for which the warrant is sought is within the jurisdiction of the officer seeking the warrant, he may execute the warrant even if the place to be searched is outside his territorial jurisdiction. However, unless unusual circumstances exist, it is advisable to inform the local police department that another police department will

be entering its jurisdiction to execute a search warrant and to request the assistance of local officers.

4. The search warrant docket number is added by the appropriate court official. A warrant issued by a District Court may have the docket number inserted at the time of issuance. A District Court warrant issued after normal business hours or a Superior Court warrant issued at any time will usually have the docket number inserted after the warrant has been returned.

5. The factual information providing probable cause to search is put in a separate document called an affidavit. Guidelines on how to establish probable cause in an affidavit are contained in Part III. The search warrant form provides a printed affidavit form entitled "Affidavit In Support Of Application For Search Warrant," use of which is optional. If additional pages are necessary the affidavit form may be photocopied.

If the officer uses ordinary paper instead of the printed form, the affidavit form should be set up as follows:

Affidavit of [Detective Gerald Baptist]

1. I, [Gerald Baptist], being duly sworn, depose and say: I am a [Detective] in the [Cambridge Police Department]. I have been a police officer for [fifteen] years, [nine] of which as a [Detective]. (Depending on the type of warrant, the officer should set forth any special expertise that he has in the area, e.g., "over 200 arrests for narcotics offenses" or "attended numerous courses on arson investigation, including")
2. (In the succeeding paragraphs, the officer should detail the basis for his belief that probable cause to search exists, particularly describe the items he has probable cause to search for, and particularly describe the premises to be searched.)

Signed under the pains and penalties of perjury this ____ day of _____, 199_.

Signature of Affiant

Then personally appeared the above named Gerald Baptist and made oath that the foregoing affidavit by him subscribed is true.

Before me this ____ day of _____, 199_.

Judge/Clerk/Assistant Clerk
(Use appropriate title)

If you choose to submit for review additional documents with the search warrant application and affidavit, such documents should be attached, specifically referred to, and incorporated in the affidavit. Commonwealth v. Truax, 397 Mass. 174, 179 & n.1 (1986); Commonwealth v. DeCologero, 19 Mass. App. Ct. 956, 958-959 (1985). An issuing judge or magistrate may consider all documents incorporated by reference in the affidavit in determining probable cause. Commonwealth v. McRae, 31 Mass. App. Ct. 559, 561-562 (1991) (composite drawing of defendant in form of "wanted" poster, with description of defendant's clothing, was incorporated in affidavit by reference and could be considered by issuing judge in determining existence of probable cause). Be sure to indicate on the application form the total number of pages attached.

Whatever information is known by police must be included in the affidavit in order for an issuing magistrate to consider it in determining the existence of probable cause. Information imparted orally to an issuing magistrate by police may not be considered. Commonwealth v. Treadwell, 402 Mass. 355, 358 n.4 (1988); Commonwealth v. McRae, 31 Mass. App. Ct. 559, 560 (1991).

6. Check the appropriate boxes to describe the relationship of the property to be seized to the crime being investigated. One example of when the last box ("other") may be used is when the search is for a person or evidence of the whereabouts of a person connected to the crime being investigated.

7. The property sought should be described as particularly as possible. See generally Commonwealth v. Dunigan, 384 Mass. 1, 6-7 (1981). Where particularization is available but not used in the warrant, evidence discovered will be subject to suppression. Commonwealth v. Rutkowski, 406 Mass. 673, 674-675 (1990). Be sure to include the description of property sought in the affidavit as well as in the application.

a. Controlled Substances: It is sufficient to refer to controlled substances by name, e.g., heroin, cocaine.² In narcotics cases, when searching for drugs as well as items related to the possession or distribution of controlled substances, the property should be described as follows:

"Cocaine, a controlled substance as defined by Chapter 94C; and all books, papers, records, documents, monies, implements and paraphernalia related to the illegal possession and distribution of controlled substances."

b. Gaming Paraphernalia: The description will depend on the type of gaming operation involved. A bookmaking operation will often involve "telephone records, betting slips and other records relating to illegal gaming." A casino-type operation might involve "cards, chips, roulette wheels, and dice." In some cases, the police might

² The controlled substance searched for should be specifically named. Do not describe property searched for as "controlled substances including, but not limited to, cocaine . . ." or any like formulation. This type of description results in a general warrant. Commonwealth v. Fernandes, 30 Mass. App. Ct. 335, 340-341 (1991).

be seeking "slot machines" or "video poker game machines." In gaming cases, the police should also seek money and records in addition to the gaming paraphernalia.

c. Firearms: When seeking firearms, rifles, or shotguns, one should ask to search for ammunition as well. In cases involving a stolen gun, the description in the affidavit and warrant will often be based on information supplied by the owner such as make, model, and serial number. In cases involving the use of a gun in the commission of a crime or the possession of a gun without a license to carry or a firearms identification card, the description of the gun may be less exact. For example, in some armed robbery cases, the police may only know that the gun used by the robber was a handgun, its color, and perhaps whether it was a revolver or an automatic.

d. Stolen Property: The description of stolen property must be as particular as possible because the stolen nature of an item is not readily apparent by looking at it. In Commonwealth v. Taylor, 383 Mass. 274, 274-282 (1981), the Supreme Judicial Court held that a description of the property to be seized as "antique stolen jewelry" was insufficient. An attachment providing a detailed description of each item of jewelry was missing, causing the warrant to become a general warrant. See also Commonwealth v. Rutkowski, 406 Mass. 673, 674 (1990). Other ways to identify stolen property include serial number, brand-name, size, material, and distinctive marks or features. In some cases it may be useful to attach a photograph or drawing of the item to the affidavit and the warrant.

e. Evidence Of A Crime: This will vary with the type of crime and evidence involved. As with stolen property, the description should be as particular as possible. Avoid descriptions such as, ". . . and any other evidence of the crime of murder." Where the evidence involved includes photographs taken by the suspect, e.g., a child molester who photographs his victims, the police may wish to search for undeveloped rolls of film which may include photographs relevant to the crime. In such cases, in addition to asking for the seizure of the film, the police should also specifically request the authority to develop the film. Such a description of the property to be seized might read:

Photographs of children engaged in sexual activities with other children and/or with adults; undeveloped but exposed rolls of film (including the authority to develop and print the film).

In some cases, rolls of film for which there is probable cause to believe they depict evidence of a crime may come into police custody by means other than a search warrant, e.g., automobile stop, discovery in plain view during the execution of a search warrant. In such cases, a search warrant should be obtained authorizing the development and printing of the film. As a precautionary measure, until the courts clarify this area of law, search warrants should be obtained to inspect other media not accessible by the unaided eye or ear, such as motion picture film, videotape, audiotape, and information on computer disks.

f. Persons For Whom Arrest Warrant Is Outstanding:

The police may enter a person's home to arrest him solely on the basis of an arrest warrant. To search for evidence in the suspect's home, the police should also get a search warrant. See Commonwealth v. Watkins, 425 Mass. 830, 841-842 (1997). However, if a wanted person takes refuge in a third-party's dwelling, both a search warrant for the premises and an arrest warrant for the person are necessary in order to enter that dwelling to make the arrest. Steagald v. United States, 451 U.S. 204, 222 (1981). If the police failed to obtain a search warrant in this situation, any evidence seized which incriminated a third party would be suppressed. The person named in the arrest warrant, however, would have been validly arrested and could be brought to trial, and evidence validly seized from him at the point of arrest could be used against him. See Commonwealth v. Allen, 28 Mass. App. Ct. 589, 592 (1990).

The description in the warrant and affidavit of the person to be searched for should include a brief physical description, including any distinguishing features. Where feasible, a photograph of the person sought might be attached to each document. A description of the person sought in such a case might read:

Ellis Richardson (D.O.B. 5/22/59), a living person who is wanted under Cambridge District Court arrest warrant no. 85-1238, charging aggravated rape, which is currently outstanding (a photocopy of the arrest warrant is attached to this affidavit and incorporated herein by reference). Richardson is a white male, 5'10" tall, approximately 110-120 pounds, brown hair and eyes, with a 3-inch scar on his left cheek and a tattoo of a mermaid on his upper right arm.

(Photocopies of his photograph are attached to the affidavit and warrant and incorporated by reference herein.)

g. Blood Extraction:

A search warrant may be obtained for the extraction of blood from an individual, if probable cause exists to believe that the individual whose blood is sought committed the crime. The affidavit must establish a nexus between the evidence sought (the blood) and the crime. Additionally, the individual is entitled to a hearing before the warrant issues from which the judge must make findings as to the degree of intrusion and the need for the evidence of the blood sample. In deciding whether to order extraction, the judge must weigh the seriousness of the crime, the importance of the evidence to the investigation, and the unavailability of less intrusive means of obtaining such evidence, against the defendant's constitutional right to be free from bodily intrusion. In the Matter of Lavigne, 418 Mass. 831, 834-836 (1994). As with body cavity searches, officers seeking warrants for the extraction of blood should first consult with an assistant district attorney.

8. Describe the premises to be searched. The application form has three boxes which should be checked as applicable. More than one box may apply.

If the first box is checked, the officer should then give the address, including the city or town, Commonwealth v. Pellier, 362 Mass. 621, 624 (1972), and a description of the exterior of the premises to be searched as well as the names, if known, of the persons occupying the premises to be searched and/or in possession of the property to be seized.

It is very important that this description be accurate, and that the description match the information contained in the affidavit. If a description is provided by an informant, have an officer confirm the information to the best extent possible under the circumstances. An inaccurate or ambiguous description can result in the suppression of an otherwise valid warrant. Commonwealth v. Treadwell, 402 Mass. 355, 359-360 (1988).

The premises to be searched should be described with sufficient particularity to allow an officer to locate and identify the premises with reasonable effort. If there is a reasonable probability that the wrong place might be mistakenly searched, the warrant should not be executed. Commonwealth v. Walsh, 409 Mass. 642, 645 (1991). The description should enable an officer to differentiate the premises from those around it. Commonwealth v. Demogenes, 14 Mass. App. Ct. 577, 581 (1982).

When a description is adequately particular, but a view of a particular location reveals an ambiguity in the description, the knowledge of the executing officers may be sufficient to overcome the ambiguity. Commonwealth v. Treadwell, 402 Mass. at 359. Commonwealth v. Gonzalez, 39 Mass. App. Ct. 472, 477 (1995). Therefore, it is strongly advised that the executing officers bring a copy of the affidavit with them when they execute the warrant. See Commonwealth v. Walsh, 409 Mass. at 645. The affidavit need not be shown to persons on the premises at the time. Additionally, the Supreme Judicial Court has required that the police actually possess a copy of the warrant at the

scene before they execute the warrant. Failing that, the search will be considered a warrantless search for which the Commonwealth must show a justification. Commonwealth v. Guaba, 417 Mass. 746, 754 (1994). In some cases, it may be worthwhile to attach a photograph of the premises to both the warrant and the affidavit. In any event, the affidavit must contain enough information for the issuing magistrate to determine that the items sought are related to criminal activity under investigation and that they may reasonably be expected to be found in the place to be searched. Commonwealth v. Saleh, 396 Mass. 406, 411 (1986); Commonwealth v. Burt, 393 Mass. 703, 715 (1985). The particularity requirement is not satisfied where the affidavit and warrant state that the investigating officer will identify the target premises before the warrant is executed. Commonwealth v. Douglas, 399 Mass. 141, 144 (1987).

a. Single-Family Home (or other building to be searched in its entirety): Normally the street address and a brief description, e.g., color, building material, number of floors, will be sufficient. Reference may be made to certain distinctive features, e.g., specific type of porch, fence, swimming pool, number on the outside, that differentiates the premises to be searched from all others. It might also be advisable to include certain out-buildings, e.g., garages, tool sheds, barn, within the scope of the warrant. Where the premises to be searched is a business, reference should be made to any signs identifying the business.

b. Multi-Unit Building: If the premises to be searched is located in a multi-occupancy building, e.g., apartment building or office building, the affidavit must provide probable cause for each unit the police wish to search. Commonwealth v. Hall, 366 Mass. 790, 798-800 (1975); Commonwealth v. Erickson, 14 Mass. App. Ct. 501, 504 (1982). The affidavit and warrant must describe the specific unit to be searched as well as the building in which the unit is to be found. Reference may be made to the unit number ("Apt. 7-B"), to the floor if the unit to be searched occupies the entire floor ("2d floor apt. of a three-story dwelling"), or to the location of the unit ("rear apt. on the right-hand side of the fourth floor when viewed from the front" or "2d door on the left as you enter the second floor hallway from the front stairwell"). It may be advisable to include certain common areas to which the target of the search has access, e.g., cellar, attic, storage area, within the scope of the warrant. An officer who knows or has reason to know that there is more than one apartment in a particular multi-unit dwelling, must identify and thereby exclude all but the suspect's apartment from the scope of the warrant. Commonwealth v. Carrasco, 405 Mass. 316, 322-325 (1989). An accurate description of the particular apartment is critical. Commonwealth v. Treadwell, 402 Mass. at 359; Commonwealth v. Pacheco, 21 Mass. App. Ct. 565, 567 (1986). However, if the police after reasonable investigation do not know, and reasonably could not have known, of the multi-unit character of the premises at the time of the warrant's issuance, a warrant to

search the entire premises is valid, as long as there is probable cause to search every separate unit. Commonwealth v. LaPlante, 416 Mass. 433, 439 (1993).

In general, and particularly with respect to multi-unit buildings, it is advised that the affiant participate in the execution of the search warrant. If a technical discrepancy between the description of the premises in the warrant and the actual premises is discovered following the search, and the search is challenged in court, the court will inquire whether the affiant participated in the execution of the warrant in determining whether the search was within constitutional bounds. See Commonwealth v. Gonzalez, 39 Mass. App. Ct. 472, 476-477 (1995). The test is whether "the description is sufficient to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premises might be mistakenly searched which is not the one intended to be searched under the search warrant." Id. at 476, quoting Commonwealth v. Rugaber, 369 Mass. 765, 768 (1976). This test is more likely to be satisfied if the executing officer is also the affiant. See Commonwealth v. Clarke, 44 Mass. App. Ct. 502, 508 (1998).

c. Evidence In A Container: If the evidence being searched for is located in an automobile, suitcase, package or other container, the automobile or container is the premises to be searched, not the location where the automobile or container is being held.³ If the second box

³ Usually the automobile or container is being held by the police (in the station or police garage) or by a common carrier or delivery service (airport baggage room or parcel

is checked, the officer should name the person on whose person or in whose possession the property may be found. If authorization to search both a particular premises and a person is sought, and there is probable cause to search the person when he is not on the premises, such information should be included in the affidavit and on the warrant. Otherwise, such authorization may be read to limit the search of the person to when he is present on the premises. Commonwealth v. Santiago, 410 Mass. 737, 741-742 (1991).⁵

The third box is checked when the police have probable cause to search every person present during the search of the premises described in the warrant. Commonwealth v. Smith, 370 Mass. 335, 339-346 (1976); Commonwealth v. Sampson, 20 Mass. App. Ct. 970, 971 (1985). Occasions when this box may be checked are extremely rare. A warrant containing an "any person present" clause not supported by the requisite probable cause may still be valid as to the premises and the named target of the warrant but not as to any person searched under the authority of that clause. Commonwealth v. Truax, 397 Mass. 174, 180 (1986). Nevertheless, this box should not be checked unless the affidavit provides probable cause to believe that the property sought will be found on every person present at the premises at the time of the search. See Commonwealth v.

⁵ Under Rodrigues v. Furtado, 410 Mass. 878, 888 (1991), only judges have authority to issue warrants to search a person's body cavity and only then "on a strong showing of particularized need supported by a high degree of probable cause." Police should not seek authorization to search a person's body cavity without first consulting with an Assistant District Attorney.

Souza, 42 Mass. App. Ct. 186, 188-191 (1997). Examples of the extremely rare circumstances in which this box could properly be checked include where a "floating crap game" or "crack house" is involved. See Commonwealth v. Baharoian, 25 Mass. App. Ct. 35, 38-39 (1987).

9. The officer should indicate whether or not the same application has been previously submitted to another magistrate. If a judge or clerk has refused to issue an application and you present the same application to a different judge or clerk for review, you must check the first box. If, however, you have conducted a further investigation and made substantive changes to the application, you may check the second box. See Commonwealth v. Pratt, 407 Mass. 647, 658-659 (1990).

10. Print or type the name of the officer applying for the search warrant. The failure to state the affiant's name is of no consequence if he is sufficiently identified elsewhere in the application. Commonwealth v. Snow, 363 Mass. 778, 785-786 (1973); Commonwealth v. Hanscom, 2 Mass. App. Ct. 840 (1974).

11. Sign affidavit and the application in the presence of the issuing magistrate. The failure of the affiant to sign the affidavit is of no consequence if he was sworn by the magistrate and is sufficiently identified in the body of the affidavit or in the jurat. Commonwealth v. Young, 6 Mass. App. Ct. 953, 954 (1978). See also Commonwealth v. Truax, 397 Mass. 174, 179 (1986); Commonwealth v. Bass, 24 Mass. App. Ct. 972, 975 (1987).

12. Have the issuing magistrate sign both the application and the affidavit, making sure that he or she indicates an appropriate title. If the magistrate fails to sign the affidavit, the warrant will be invalid. Commonwealth v. Dozier, 5 Mass. App. Ct. 865, 865-866 (1977).

13. Be sure that the magistrate fills in the date if you have not already done so.

14. If you are seeking permission for a civilian to assist police in executing the search warrant, you should type somewhere on the search warrant itself: "I also seek permission for John Doe to assist police in the search." See Commonwealth v. Sbordone, 424 Mass. 802, 806 n.9 (1997).

B. Search Warrant

Since the application form is separated from the search warrant form by a carbon paper page, the warrant form will be partially completed when the two forms are separated. The officer should check to make sure that all the information came through legibly and that any typing mistakes made on the application are corrected on the warrant.

a. Same as on Application.

b. Same as on Application.

c. Same as on Application.

d. Same as on Application.

e. Time Of Search: If the search is to be made at night, check box next to the word "are", otherwise check box next to the words "are not". Although not required, it is best to state the reasons which would justify issuance of a

nighttime warrant. Commonwealth v. Garcia, 23 Mass. App. Ct. 259, 261 (1986). For warrant purposes, "nighttime" begins at 10:00 P.M. and ends at 6:00 A.M. Commonwealth v. Grimshaw, 413 Mass. 73, 81 (1992). (See Part V.B.)

f. If a "No-Knock" warrant is being issued, the box next to the word "are" should be checked; otherwise check the box next to the words "are not". The affidavit should include reasons to justify the issuance of a no-knock warrant. Commonwealth v. Gomes, 408 Mass. 43, 45 (1990). (See Part V.D.)

g. If probable cause exists to search every person present, check the box next to the word "are," otherwise check the box next to the words "are not". The situations when probable cause exists to search every person present are extremely rare. (See Part II.A.8. above.)

h. Fill in the name of the court to which the warrant is returnable. A Superior Court warrant may be, and usually should be, made returnable to the District Court for the district where the crime occurred. G.L. c. 276, §§2B, 3A. A District Court warrant must be returned to the court where it was issued. G.L. c. 218, §35; c. 276, §3A.

i. Be sure the magistrate fills in the date if you have not already done so.

j. For all Superior Court warrants, in the "witness" block print or type the name of the Administrative Justice of the Superior Court (currently, Chief Justice Robert A. Mulligan). For District Court warrants, insert the name of the Presiding Justice of the applicable District Court

division (e.g., in Cambridge, currently, Presiding Justice Arthur Sherman).

k. Obtain the issuing magistrate's signature. Failure to do so may invalidate the warrant. But see Commonwealth v. Pellegrini, 405 Mass. 86, 88 (1989).

l. Have the issuing magistrate print his or her name and indicate an appropriate title.

III. THE AFFIDAVIT

A. Probable Cause - In General

The affidavit must contain sufficient factual information to establish that there is probable cause to believe that the evidence sought is related to the criminal activity under investigation and that such evidence may reasonably be expected to be found in the place to be searched. Commonwealth v. Cefalo, 381 Mass. 319, 328 (1980); Commonwealth v. Sapoznik, 28 Mass. App. Ct. 236, 247 (1990). See Commonwealth v. Robles, 423 Mass. 62, 65-66 (1996) (affidavit supporting warrant to seize and analyze suspect's coat following his arrest did not establish probable cause to believe that suspect was wearing coat when he committed crime). Note that there is a difference between probable cause to believe someone is involved in criminal activity, e.g., drug distribution, and probable cause to believe that evidence of the crime may be found in a particular place, e.g., the target's home or car. See Commonwealth v. Saleh, 396 Mass. 406, 411 (1985); Commonwealth v. Cinelli, 389 Mass. 197, 213 (1983); Commonwealth v. Mantinez, 44 Mass. App. Ct. 513, 519 n.5

(1998); Commonwealth v. Laughlin, 40 Mass. App. Ct. 926, 927 (1996). The affidavit must establish a nexus between the items sought and the place to be searched. In many cases, the items sought are of the type which may reasonably be expected to be in one's residence, e.g., ammunition, clothing, etc. Commonwealth v. James, 424 Mass. 770, 778 (1997); Commonwealth v. Cinelli, 389 Mass. at 213. In other situations, e.g., drug distribution investigations, the facts must link the evidence to the place to be searched.⁶ Commonwealth v. Saleh, 396 Mass. at 411. The reviewing court will look to such factors as the type of crime, the nature of the evidence sought, and the extent of the target's opportunity for concealment to determine if the necessary link exists. Commonwealth v. Pratt, 407 Mass. 647, 661 (1990); Commonwealth v. Burt, 393 Mass. 703, 715 (1985); Commonwealth v. Cinelli, 389 Mass. at 213.

As a general rule, set out the relevant facts in chronological order. If the information supporting probable cause did not come from informants, the officer should

⁶ A case in point is Commonwealth v. Olivares, 30 Mass. App. Ct. 596 (1991). The defendant sold drugs at his business and, following a search of the business, police executed a warrant at the defendant's residence. Despite the facts that the informant telephoned the defendant at home to set up the buy and the defendant was seen leaving his home in the same truck in which he then arrived at the business to make the sale, the court did not find a nexus between the drug sales and the residence. The defendant was not seen carrying anything into the business before the sale and "there was no specific information in the affidavit which tied the defendant's residence to illegal drug transactions, other than that he lived" there. Id. at 600. See also Commonwealth v. Laughlin, 40 Mass. App. Ct. 926-927 (1996).

simply set forth the facts learned during the investigation and the sources of those facts in his affidavit. For example, in a rape case the affidavit should include the details of the rape itself (including any weapons used in the crime), the identity of the defendant and a description of the clothing worn by him during the crime, and the facts which establish that the defendant resides in the place to be searched. The names of all persons conducting the investigation should also be included.

Avoid making conclusory statements. If a conclusion must be made in order to establish probable cause, state the basis upon which the conclusion was made and the expertise of the person making the conclusion. For example, in a stabbing homicide case, police may want to search a suspect's house for freshly washed clothing. The relevance of this evidence may not be apparent to a lay person. Thus, the affiant might state that, based on his experience investigating homicide cases, he knows that perpetrators often wash the clothing they wear while committing the crime in order to destroy evidence, and that, therefore, freshly washed clothing might be evidence of consciousness of guilt. In addition, the affidavit might state the background and experience of the chemist and the chemist's statement that microscopic traces of the victim's blood may be detected on the perpetrator's clothing, even after the clothes have been washed. In cases where a narcotics detecting dog contributes to probable cause, the qualifications of the dog and its handler must be stated in the affidavit. See Commonwealth v. Welch, 420 Mass. 646, 655 (1995).

Similarly, in drug cases, surveillance might reveal several "stop and go" visits to the premises. Since the significance of this may not be apparent to the lay person, an experienced investigator should state in the affidavit that, based on his training and experience, the observed conduct is consistent with drug dealing.

In general, information unlawfully obtained by police may not be relied upon to establish probable cause. See Wong Sun v. United States, 371 U.S. 471, 481-482 (1963); Commonwealth v. Benoit, 382 Mass. 210, 214 (1981). Thus, in order to rely in the affidavit on items observed by an officer in plain view, the officer must have been lawfully in the place where he viewed the items; similarly, in order to rely on items discovered during a prior search, the prior search must have been lawful. Information obtained through police eavesdropping may be considered to establish probable cause only if the target does not have a reasonable expectation that his communications will not be overheard. Commonwealth v. Hall, 366 Mass. 790, 794-795 (1975).⁷ In addition, statements of a target must be voluntary and obtained in compliance with the Miranda decision in order to provide probable cause in a search warrant directed toward the target. Commonwealth v. Dunn, 407 Mass. 798, 806

⁷ While officers may rely on conversations overheard while standing in a common hallway or apartment or motel room contiguous to a target's residence, they may not rely on conversations overheard from an area, such as a crawlspace, to which no member of the public has access. See Commonwealth v. Panetti, 406 Mass. 230, 234-235 (1989).

(1990); Commonwealth v. Meehan, 377 Mass. 552, 568-569 (1979).

B. Probable Cause When Using Informants

In Commonwealth v. Upton, 394 Mass. 363, 373 (1985), the Supreme Judicial Court held that article 14 of the Massachusetts Declaration of Rights requires police officers in Massachusetts to satisfy the Aguilar-Spinelli "two pronged test" for determining probable cause where information comes from confidential informants. This standard is arguably stricter than the more flexible federal standard applied to confidential informants' statements under the Fourth Amendment to the United States Constitution. Under this test, the affidavit must set forth (1) facts sufficiently detailing the manner in which the information in the affidavit was obtained, so as to assure the magistrate that the allegations are derived, not from casual rumor, but rather from first-hand knowledge (the "basis of knowledge" prong) and (2) facts sufficiently establishing the inherent credibility of the informant, or the reliability of his information on this occasion (the "veracity" prong). See Commonwealth v. Reyes, 423 Mass. 568, 571 (1996).

1. Basis Of Knowledge - This requirement may be satisfied in a variety of ways, depending upon the circumstances of the case.

a. Personal Observations - informant sees evidence (drugs, stolen property, etc.) in premises to be searched;⁸

⁸ The affidavit should refer explicitly to facts seen by the informant, for example, a "\$40 packet of cocaine," rather than to terms common in the illegal drug trade, e.g.

officers smell odor of burning marijuana coming from motor vehicle; or witness hears sound of gunfire. See Commonwealth v. Byfield, 413 Mass. 426, 429 (1992); Commonwealth v. Amral, 407 Mass. 511, 514 (1990); Commonwealth v. Parapar, 404 Mass. 319, 322-323 (1989); Commonwealth v. Valdez, 402 Mass. 65, 70 (1988).

b. Statements By Target - target tells informant to come on over because he has plenty of cocaine for sale, or that he will be picking up a supply of cocaine on a given date. See Commonwealth v. Shea, 28 Mass. App. Ct. at 30-31; Commonwealth v. Rosa, 17 Mass. App. Ct. 495, 497 (1984).

c. Detailed Information - In some circumstances, a statement that the informant personally observed contraband may reveal the informant's identity and therefore, ought not to be included in the affidavit. The basis of knowledge prong may still be satisfied, however, if the tip provides specific, nonobvious, and predictive detailed information which is corroborated by police. Such detailed information may sometimes permit an inference that the informant himself has observed the facts. Commonwealth v. Atchue, 393 Mass. 343, 348 (1984).

For example, in Commonwealth v. Mebane, 33 Mass. App. Ct. 941, 943 (1992), an informant predicted that the target, described as a black man with facial hair and a severe limp, would arrive at a train station at a certain time carrying

a "forty." Commonwealth v. Byfield, 413 Mass. 426, 429 (1992). At the very least, such slang terms should be explained by the affiant in his/her training and experience. 28, 30-31 (1989); Commonwealth v. Rosa, 17 Mass. App. Ct. 495, 497 (1984).

drugs and weapons. The police corroborated the target's appearance and his arrival at the train station at the predicted time. Upon questioning, the target revealed his destination which the police knew was the scene of a recent drug raid. The court held that the informant's tip was sufficiently detailed in significant respects, e.g., the facial hair and the limp, and that corroboration of these details along with the information regarding the target's destination made up for the fact that the informant did not reveal its basis of knowledge. Contrast Commonwealth v. Brown, 31 Mass. App. Ct. 574, 578-579 (1991) (informant's description of target had no distinguishing characteristics and no detail as to criminal activity). (See also Part III.B.3. below.)

Likewise, in Commonwealth v. Cast, 407 Mass. 891, 897 (1990), an informant named the target, described his appearance, gave his phone number, knew of his national origin and citizenship status and how he had obtained that status as a result of marriage to a Massachusetts native, and described the anglicization of his name, his pick-up truck, and employment situation. The informant also said the defendant used luxury cars and expensive hotels. From this level of detail, the court held that it could be inferred that the informant had direct knowledge of the defendant and his criminal activities, based on personal observation and contacts. The court concluded that any remaining deficiency in the basis of knowledge prong was saved by police corroboration of more than innocent details.

See also Commonwealth v. Bakoian, 412 Mass. 295, 302 (1992); Commonwealth v. Rosario, 37 Mass. App. Ct. 920, 921 (1994).

d. Controlled Buy - In a controlled buy, police will watch an informant enter a premises (usually of a drug dealer) in order to make a purchase. Prior to letting the informant make the buy, he should be thoroughly searched to make sure that he has neither drugs nor money of his own. (The facts of this search and the results should be included in the affidavit.) The informant should be kept under observation until he enters the premises. When the informant leaves, he should be kept under observation until he can turn over the drugs to the investigating officers. The informant should again be thoroughly searched to ensure that he is not holding back any drugs. See Commonwealth v. Benlien, 27 Mass. App. Ct. 834, 837-839 (1989). A properly conducted controlled buy can provide an informant's statements both a basis of knowledge and reliability. Commonwealth v. Warren, 418 Mass. 86, 89 (1994). See Commonwealth v. Villella, 39 Mass. App. Ct. 426, 427 (1995) ("It is well settled that a controlled buy supervised by police provides probable cause to issue a search warrant").

If the informant purchases the narcotics through an intermediary who is not subject to search, the buy will still establish probable cause as it does in an ordinary controlled buy, as long as the intermediary is under police surveillance during the exchange. Commonwealth v. Villella, 39 Mass. App. Ct. 426, 428 (1995).

2. Veracity/Reliability - This requirement may also be established in a number of ways.

a. Information Provided By Other Police Officers

A police officer's affidavit will often incorporate information provided by other police officers. The fact that the source of the information is identified as another law enforcement officer is sufficient to establish reliability. Commonwealth v. Vynorius, 369 Mass. 17, 22 (1975). Probable cause may be based on the collective knowledge of police officers working in a cooperative effort. See Commonwealth v. Scott, 29 Mass. App. Ct. 1004, 1006 (1990). It is good practice to state the name of the officer giving the information and indicate his department. It is important to note that, if the officer providing the information to the affiant received that information from another source, then the reliability of that other source must be independently established. See Commonwealth v. Rossetti, 349 Mass. 626, 632 (1965).

b. Information Provided By An Informant Who Is Named In The Affidavit

This is one of the best means of establishing informant reliability, although for practical reasons, an informant's identity will rarely be revealed. Courts have recognized that an informant who levels a serious charge of criminal activity and allows himself to be named in an affidavit is presumptively reliable. Commonwealth v. Atchue, 393 Mass. 343, 347-348 (1984). Commonwealth v. Zuluaga, 43 Mass. App. Ct. 629, 635-636 (1997) (paid, named informant willing to

wear body wire). Commonwealth v. Norris, 6 Mass. App. Ct. 761, 765 (1978).

NOTE: If the information from a named person incorporates statements of another individual, there must be sufficient indicia of the basis of knowledge and reliability of that individual's statements to establish probable cause. Commonwealth v. Harding, 27 Mass. App. Ct. 430, 435-36 (1989). See Commonwealth v. Grzembski, 393 Mass. 516, 521-522 (1984).

c. Information Provided By A Witness To Or Victim Of A Crime

This is the so-called "concerned citizen" informant, an average citizen who by chance has been placed in a position to provide information about a crime. Courts have relaxed the Aguilar standard where the informant is an average citizen, a witness to, or a victim of a crime. Commonwealth v. Burt, 393 Mass. 703, 710 (1985); Commonwealth v. Fontaine, 28 Mass. App. Ct. 575, 576 (1990); Commonwealth v. Higginbotham, 11 Mass. App. Ct. 912, 913 (1981); Commonwealth v. Lee, 10 Mass. App. Ct. 518, 526-528 (1980). See United States v. Rueda, 549 F.2d 865, 869 (2d Cir. 1977) (collecting cases holding that the requirement of known reliability should be relaxed when dealing with eyewitnesses and participants in a crime). The affiant should include the name of the concerned citizen. If it is necessary to leave out the name, the affiant should include some other information regarding the citizen's veracity in order to ensure the application of this more relaxed standard. See Commonwealth v. Rojas, 403 Mass. 483, 488 (1988).

d. Information Provided By An Informant Who Is Not Named In The Affidavit

Unlike information provided by named informants, information provided by informants who are not named in the affidavit, whether known to the police or anonymous, are automatically suspect. Thus, the veracity prong of the Aguilar-Spinelli test is especially crucial for the unnamed informant. There are a variety of factors which may contribute to the credibility of an unnamed informant. It is best to include as many factors as are available in the affidavit.

(i) The Informant Has Provided Reliable Information In The Past

The veracity prong of the Aguilar-Spinelli test is most often satisfied by indicating in the affidavit that the informant has provided information in the past which proved to be accurate. The accuracy of the tip warrants an inference that the informant was reliable. Commonwealth v. Perez-Baez, 410 Mass. 43, 45-46 (1991). See also Commonwealth v. Rojas, 403 Mass. 483, 486-487 (1988). The affidavit should describe the prior information given regarding an investigation (e.g., the informant stated that cocaine would be found at a certain place) and that police verified the tip (e.g., based on the informant's statement, a search warrant issued and a search of the place resulted in the seizure of a quantity of cocaine and the arrest and conviction of a named individual).

It is not enough to allege simply that an informant has provided information in the past which resulted in one or

more arrests of a named or unnamed individual or which led to arrests on drug-related offenses. Commonwealth v. Santana, 411 Mass. 661, 663-665 (1992); Commonwealth v. Montanez, 410 Mass. 290, 300 (1991); Commonwealth v. Rojas, 403 Mass. 483, 486 (1988). Compare Commonwealth v. Valdez, 402 Mass. 65, 70-71 (1988) (informant's tip which led to the arrest of someone who was wanted on an arrest warrant was sufficient to establish veracity, because the informant gave accurate information as to the arrestee's whereabouts). If the informant's tips have resulted in an arrest only, without a conviction, there must be some details presented in the affidavit which indicate that the prior information had proven to be correct. Commonwealth v. Lapine, 410 Mass. 38, 40-42 (1991). It might be sufficient to aver that an informant had given information in the past, which proved to be accurate and led to an arrest, which case is pending in the Superior Court following a determination of probable cause in the District Court or a grand jury indictment. Commonwealth v. Soto, 35 Mass. App. Ct. 340, 343 (1993).

The fact that an informant had provided information in the past which led to an arrest and the seizure of controlled substances will suffice to establish the informant's reliability. Commonwealth v. Perez-Baez, 410 Mass. at 46; Commonwealth v. Lopez, 31 Mass. App. Ct. 547, 549 (1992). See also Commonwealth v. Byfield, 413 Mass. 426, 431 (1992); Commonwealth v. Mendez, 32 Mass. App. Ct. 928, 929 (1992) (role of informant apparent from statement that informant's tip led to arrest and confiscation of 14 grams of cocaine). Only one instance of prior accuracy is

necessary to establish an informant's veracity, See Commonwealth v. Vynorius, 369 Mass. 17, 21 (1975), and usually the passage of time does not affect the usefulness or veracity of the prior accurate information, Commonwealth v. DiPietro, 35 Mass. App. Ct. 638, 642 (1993).

While it is prudent to include some details, there is no requirement that the past arrests, convictions, and seizures be identified, if it might affect an informant's anonymity. Commonwealth v. Grady, 33 Mass. App. Ct. 917, 918 (1992); Commonwealth v. Shea, 28 Mass. App. Ct. 28, 31 (1989). See Commonwealth v. Padilla, 42 Mass. App. Ct. 67, 70 n.7 (1997) (past information given by location of premises).

(ii) Incriminating Admissions By The Informant

A statement against an informant's penal interest makes it more likely that his information is reliable. United States v. Harris, 403 U.S. 573, 583-585 (1971); Commonwealth v. Stewart, 358 Mass. 747, 752 (1971). In order for a statement to be considered against the informant's penal interest, there must be information in the affidavit which tends to show that the informant would have had a reasonable fear of prosecution at the time that he made the statement. Commonwealth v. Alvarez, 422 Mass. 198, 204 (1996). Commonwealth v. Melendez, 407 Mass. 53, 56 (1990).

In Massachusetts, unlike other states, an admission against penal interest is not conclusive on the issue of reliability, but is merely a factor tending to demonstrate reliability. Commonwealth v. Parapar, 404 Mass. 319, 322 (1989); Commonwealth v. Benlien, 27 Mass. App. Ct. 834, 837 n. 4 (1989). An admission against penal interest is of no

value unless the informant's identity is known to the affiant (or officer to whom the informant makes the statement); accordingly, the fact that the informant's identity is known to the affiant should always be included in the affidavit. See Commonwealth v. Allen, 406 Mass. 575, 579 (1990).

Moreover, recently the Supreme Judicial Court has indicated that it will give little weight to an admission by an informant that he has bought or used drugs, unless the statement is made under circumstances that would cause the informant to have a reasonable fear of prosecution. Commonwealth v. Melendez, 407 Mass. 53, 56 (1990). For example, the informant may have been caught by police with bags of marijuana sticking out of his pockets. After being advised of his Miranda rights, the informant confesses that he bought the drugs, hands over the drugs and tells the police where he bought them. Under these circumstances, the courts would find that the informant truly risked prosecution. Commonwealth v. Vynorius, 369 Mass. 17, 21 (1975).

The Aguilar-Spinelli test is most strictly applied against the paid unnamed informant. State v. Schmeets, 278 N.W.2d 401, 408 (N.D. 1979). See Commonwealth v. Martin, 6 Mass. App. Ct. 624, 627 (1978). Courts have little reason to give weight to a statement against penal interest made by a "'protected stool pigeon' whose inaccuracies or indiscretions are tolerated on a continuing basis in exchange for information." Commonwealth v. Melendez, 407 Mass. at 57. As a result, if the informant is not receiving

money, promises of lenient treatment for pending cases, or other rewards for his information, this should be affirmatively set forth in the affidavit.

(iii) The Informant Provides Very Detailed And Specific Information

An informant's tip may be found to be credible if it contains a high degree of specificity and detail, Commonwealth v. Atchue, 393 Mass. 343, 348 (1984), and other indicia of reliability are present. Such other indicia include the fact that the informant was known to the police or that police investigation corroborated the informant's tip. See Commonwealth v. Mebane, 33 Mass. App. Ct. 941, 943 (1992). (See III.B.3.) A tip which provides particularized distinguishing characteristics of the defendant's apartment, possessions, or activities, for example, might contain enough detail to support a finding of veracity. Commonwealth v. Rojas, 403 Mass. 483, 487 (1988).

3. Corroboration Of The Prongs

Occasionally, you may encounter situations where the information supplied by the informant fails to satisfy one or both prongs of the Aguilar-Spinelli test. Commonwealth v. Robinson, 403 Mass. 163, 165 (1988). In these cases, you may be able to meet the requirements of the test through corroboration. The corroboration may result from other independent tips or from separate police investigation, including police surveillance, which supplement the informant's very specific information. These methods may be of particular use when dealing with first-time informants. See Commonwealth v. Truax, 397 Mass. 174, 178 (1986). See

also Commonwealth v. Cast, 407 Mass. 891, 896-900 (1990); Commonwealth v. Rosario, 37 Mass. App. Ct. 920-921 (1994). Corroboration of an informant's tip gives police reason to believe that the informant could be relied upon to be telling the truth about any remaining unverified portion of the tip. Commonwealth v. Cast, supra at 900.

a. Basis of Knowledge Prong

Detailed information may sometimes imply that the informant himself has observed the facts. Commonwealth v. Atchue, 393 Mass. 343, 348 (1984), quoting Spinelli v. United States, 393 U.S. 410, 425 (1969). Commonwealth v. Spano, 414 Mass. 178, 184 (1993). If an informant provides a tip, it must include more than obvious details which a bystander could have learned. See Commonwealth v. Washington, 39 Mass. App. Ct. 195, 196 (1995); Commonwealth v. Reyes, 38 Mass. App. Ct. 483, 485-487 (1995). There should be some information which suggests the informant had a special familiarity with the defendant's affairs or facts which predict future behavior. Commonwealth v. Bakoian, 412 Mass. 295, 300-301 (1992). Contrast Commonwealth v. Lyons, 409 Mass. 16, 20-21 (1990) (anonymous caller provided police with "obvious details" only, i.e., first name only of driver of car, no name for passenger).

For example:

- in Commonwealth v. Bakoian, 412 Mass. 295, 301 (1992), the informant gave the exact identities of persons in a vehicle, their exact destination, and the approximate time frame when they would arrive at the destination. Police corroborated the details of the tip when

they observed the individuals named arrive at the predicted location.

- corroboration of the details concerning the suspect's age, height, clothing and behavior (informant predicted defendant's time and place of arrival) satisfies the basis of knowledge prong. Commonwealth v. Robinson, 403 Mass. 163, 166 (1988). See Commonwealth v. Fleming, 37 Mass. App. Ct. 927, 928-929 (1994) (detailed information provided by a confidential informant regarding the defendant's appearance and the time and place of a buy, when combined with an inference of personal knowledge and police corroboration, satisfied the basis of knowledge prong). But it is not enough to have corroboration of suspect's behavior without details of suspect's appearance. Commonwealth v. Spence, 403 Mass. 182 (1988).

b. Veracity Prong

Independent police corroboration can lend credence to the informant and can satisfy the veracity prong, especially when the informant is anonymous or is supplying information for the first time. The tip must contain detailed, nonobvious facts which police can corroborate. See Commonwealth v. Voris, 38 Mass. App. Ct. 377, 379-380 (1995); Commonwealth v. Oliveira, 35 Mass. App. Ct. 645, 649-650 (1993). The tip should contain more than a description of the outside of the building or a description of a car parked outside.

For example:

- police saw known drug users or dealers entering and leaving apartment building where informant said drugs were sold. Commonwealth v. Valdez, 402 Mass. 65, 71 (1988).

NOTE: It is not enough to note in the affidavit that police observed several young men visiting an apartment for short periods of time; if the visitors were known to police as drug users or dealers it should be stated in the affidavit. Commonwealth v. Byfield, 413 Mass. 426, 430 n.7 (1992).

- police observed car described by informant as one used to transport heroin to dealers, and that driver of the car was an Hispanic male, as the informant predicted. The police independently knew the driver as a heroin dealer and user. Commonwealth v. Carrasco, 405 Mass. 316, 322 (1989).
- police corroborated informant's statements that the defendant lived at a certain apartment, that he had large amounts of currency, that he was making large cash purchases, and that he had a record of similar crimes. In addition, the informant gave a detailed description of a gun, clothing, and other items in the apartment which matched the descriptions given by the victims of a robbery. Commonwealth v. Germain, 396 Mass. 413, 418-419 (1985).
- police corroborated all the personal details the informant told them about the defendant, e.g., where he lived, what his telephone number was, what car he drove. Commonwealth v. Cast, 407 Mass. 891, 899 (1990). Compare Commonwealth v. Reyes, 423 Mass. 568, 572-573 (1996) (police corroboration was inadequate and thus did not make up for informant's lack of reliability).
- police surveillance of suspiciously criminal activity, combined with other facts learned through investigation may be sufficient corroboration. Commonwealth v. DiStefano, 22 Mass. App. Ct. 535, 538-540 (1986). Observations that may appear noncriminal to others, for example, "stop and go traffic,"

take on special significance to the trained eye of an officer. Commonwealth v. Cast, 407 Mass. at 900.

NOTE: Police should state in the affidavit that they are experienced narcotics investigators and whether certain activity indicates illegal drug sales.

- an informant's veracity can be shown by police corroboration of information about criminal activity of third parties, not of the target. Commonwealth v. Filippidakis, 29 Mass. App. Ct. 679, 685-686 (1991).
- an informant's participation in a closely supervised controlled buy is sufficient to establish the informant's veracity. Commonwealth v. Desper, 419 Mass. 163, 168-170 (1994); Commonwealth v. Benlien, 27 Mass. App. Ct. 834, 838-839 (1989). (See Part III.B.d).

Vital corroborative evidence in the form of drug residues, packaging, and records can often be found in a drug dealer's trash. The trash, if left on the public sidewalk for municipal pick-up, may be seized since there is no reasonable expectation of privacy in the trash. Commonwealth v. Pratt, 407 Mass. 647, 660 (1990). But cf. Commonwealth v. Krisco Corp., 421 Mass. 37, 45 (1995) (defendants had a reasonable expectation of privacy in a dumpster located on their commercial premises, where the dumpster was located in a fenced alley with gates at each end; it was used exclusively by the business located on the premises; the contents of the dumpster were not visible to passersby; and it was possible to gain access to its contents only by climbing into it). In addition to evidence

of the illegal activity being investigated, police officers may also find items bearing the target's name which may help establish that it is, in fact, the target's trash and premises. See Commonwealth v. Sapoznik, 28 Mass. App. Ct. 236, 248 (1990).

Finally, if the target of the search has past convictions for similar offenses or has been charged with similar offenses in pending cases, this should be included in the affidavit. Commonwealth v. Snow, 363 Mass. 778, 784 (1973); See Commonwealth v. Allard, 37 Mass. App. Ct. 676, 677 (1994). Such evidence tends to show that the target has the propensity to commit the crime then under investigation. Commonwealth v. Preston, 27 Mass. App. Ct. 16, 21 (1989). The court will afford a prior conviction little weight, however, unless it is sufficiently recent and similar to the suspected crime. Commonwealth v. Allen, 406 Mass. 575, 579 (1990) (four year old conviction for possession of marijuana too remote to be factored into probable cause calculus of target suspected of dealing in cocaine and marijuana); Commonwealth v. Melendez, 407 Mass. 53, 58-59 (1990) (conviction for possession of cocaine did not show proclivity to sell drugs). Even if the prior offense is unlike the suspected offense, the information should be included in the affidavit as it may provide some degree of corroboration. Commonwealth v. Preston, 27 Mass. App. Ct. 16, 21 (1989).

Information that will also help bolster an informant's reliability is mutual corroboration of tips from different informants. If two or more unnamed individuals

independently supply similar information to police concerning illegal activities, the statements together might establish reliability through cumulative reinforcement. Commonwealth v. Munera, 31 Mass. App. Ct. 380, 383 (1991). Thus, police should explicitly state whether the informants know each other. Mutual corroboration by independent informants, however, is of little weight unless each informant provides statements which correspond in "significant, detailed respects." Commonwealth v. Santana, 411 Mass. 661, 665 (1992) It is the amount of the detail provided in the tips, and not the number of tips that provides the necessary corroboration. Id. at 665. See Commonwealth v. Pallotta, 36 Mass. App. Ct. 669, 672 (1994).

C. Staleness

The affidavit must state facts sufficient to establish probable cause to believe that the items sought will be on the premises to be searched at the time the search warrant is executed. Commonwealth v. Morton, 26 Mass. App. Ct. 949, 950-951 (1988). If the information in the affidavit reveals that the items sought were on the premises at some point, but does not support an inference that the items will be on the premises at the time the warrant will be executed, the information is considered to be "stale." Commonwealth v. Rice, 47 Mass. App. Ct. 586, 589 (1999) (facts must be closely related to the time of the warrant's issuance to justify a finding of probable cause). Whether information is impermissibly stale, such that it would not support probable cause, is dependent on the facts of each case.

For example, an informant's observation of the target offering cocaine at a party in his home on one night would not likely support probable cause to believe that cocaine will be found in the target's home several days later. This is because one would assume that the cocaine would have been consumed on the night of the party. See Commonwealth v. Malone, 24 Mass. App. Ct. 70, 74 (1987) (as a readily disposable commodity, drugs were not likely to be found on premises several weeks after they were observed there). On the other hand, information that a defendant committed a stabbing on a particular night would likely support probable cause to believe that evidence of the crime, e.g., knives, blood, fingerprints, would be found on his premises several days later. Commonwealth v. James, 424 Mass. 770, 777-779 (1997) (18 days later); Commonwealth v. McRae, 31 Mass. App. Ct. 559, 563 (1992) (12 days later).

Time is of less significance where the affidavit recites activities of a continuing nature, not merely an isolated instance at some time in the past. Commonwealth v. Wallace, 22 Mass. App. Ct. 247, 251 (1986) (surveillance over seven year period revealed the protracted and continuous nature of illegal activities); Commonwealth v. Blye, 5 Mass. App. Ct. 817, 817-818 (1977) (numerous housebreaks suggest that defendant's possession of various items of stolen property is of a continuing nature). This will require, for example, recitation of numerous instances of drug sales by an individual and any other information which suggests he is engaged in selling drugs as a business. Commonwealth v. Alvarez, 422 Mass. 198, 205 (1996). Commonwealth v. Spano,

414 Mass. 178, 182-185 (1993). Events occurring over an extended period of time, however, must be sufficiently related to each other to give rise to the inference that they are part of a continuing course of conduct. Commonwealth v. Malone, 24 Mass. App. Ct. 70, 74 (1987). For example, an affidavit was not stale where the continuing nature of the criminal activity was established by "the number and quality of observations" and a controlled drug buy on a known date within six weeks of the affidavit. Commonwealth v. Rice, 47 Mass. App. Ct. 586, 590-591 (1999). Even where there is a continuing course of conduct, however, it is a serious defect in an affidavit if there is nothing in it which suggests the time the illegal conduct was observed. Commonwealth v. Javier, 32 Mass. App. Ct. 988, 988-989 (1992) (time of observations inferred from use of present tense in describing events constituting probable cause).

In short, staleness, and thus probable cause, is dependent on the likelihood that the items sought will be found on the premises at the time of the search. This could be affected by the time that the information was obtained and the nature of the items sought. Certain items are likely to be disposed of quickly, e.g., drugs, liquor and cash, and probable cause to believe these items are on premises diminishes rapidly with time. Commonwealth v. Malone, supra at 74. Other items are less likely to be disposed of easily without risk of detection, and therefore, probable cause to believe these items remain on premises once observed does not diminish as quickly. See United

States v. Dauphinee, 538 F.2d 1, 5 (1st Cir. 1976) (case of hand grenades); Commonwealth v. Blye, 5 Mass. App. Ct. 817, 818 (1977) (six chain saws); Commonwealth v. Fleurant, 2 Mass. App. Ct. 250, 255 (1974) (collection of guns).

D. Anticipatory Warrants

Search warrants may be issued when there is probable cause to believe that the items to be seized will be at the premises "at the time a warrant is to be executed, and not solely at the time of its issuance." Commonwealth v. Soares, 384 Mass 149, 155 (1981). These so-called "anticipatory warrants" usually are used when the police have information indicating that contraband will be delivered to the target premises in the near future. The delivery can be either within the government's control (for example, when the contraband is sent by mail and is detected before it is delivered), or out of the government's control (for example, when the police receive a reliable tip that suspects will soon receive a shipment of drugs).

As with all warrants, the role of determining that a specific item will probably be in a specific place must remain with the magistrate issuing the warrant. Commonwealth v. Douglas, 399 Mass 141, 144-145 (1987). When delivery of the contraband is not within the government's control, the magistrate can validly perform this role when the affidavit presents "strong evidence" that the items sought will be on the premises when the warrant is executed. Id. at 144; see also United States v. Hendricks, 743 F. 2d 653 (9th Cir. 1984), cert. den., 470 U.S. 1006 (1985) (requiring evidence that item is on "sure course" to

be delivered to premises). Such "strong evidence" can exist when a reliable informant with an adequate basis of knowledge provides the police with detailed facts about the circumstances, including time, means, and place, of a delivery. Commonwealth v. Rosa, 17 Mass. App. Ct. 495, 497 (1984) (informant provided police with exact departure time, description, registration number, and approximate return time of vehicle going to pick up heroin in New York). When the requisite strong evidence exists, it is immaterial that, at the time the warrant is issued, the items to be seized under the authority of the warrant are neither in, nor actively moving in the direction of, the Commonwealth. Commonwealth v. Weeks, 13 Mass. App. Ct. 194, 199-200 (1982). The "triggering event" that authorizes execution of the search warrant (e.g., the suspect's acceptance of delivery of the package containing the drugs) must be set forth in the affidavit. See Commonwealth v. Gauthier, 425 Mass. 37, 41-45 (1997); Commonwealth v. Soares, 384 Mass. 149, 155 (1981). It is also a good idea to set forth the "triggering event" on the search warrant itself, or to staple an extra copy of the affidavit to the search warrant. Gauthier, 425 Mass. at 41 n.3, 43-44 (overruling Commonwealth v. Callahan, 41 Mass. App. Ct. 420, 424-425 (1996)).

When delivery of the evidence or contraband is controlled by the government, it is important to ensure that the magistrate does not abdicate to the executing officers the role of determining that probable cause exists. Therefore, the affidavit should specify in detail the

circumstances of the government's delivery of the items sought, and those details should actually be followed. See Soares, 384 Mass. at 154-155. See also Callahan, 411 Mass. App. Ct. at 426-427 (proper practice is to include explicit language as to the triggering event in the warrant and the affidavit; and to attach affidavit to warrant when it is presented to occupant prior to search).

Note that, although anticipatory warrants are valid and may be properly sought when the requisite probable cause exists, police officers are not required to seek anticipatory warrants for contraband not yet within the officers' jurisdiction. Commonwealth v. Cast, 407 Mass. 891, 906 (1990). Thus, a warrantless search based on probable cause plus an exigency (such as the use of an automobile to transport the contraband into the officer's jurisdiction) will not be determined to be invalid because the officers could have, but did not, seek an anticipatory warrant. Commonwealth v. King, 35 Mass. App. Ct. 221, 225-226 (1993) ("police were entitled to wait until the last piece of probable cause had fallen into place [before seeking a warrant], and to rely upon the well established automobile exception"); Commonwealth v. Collazo, 34 Mass. App. Ct. 79, 83 n.6 (1993). Of course, if the exigency relied upon for a warrantless search was reasonably foreseeable and the police offer no justifiable excuse for their prior delay in obtaining a warrant, the search may not be valid. Commonwealth v. Forde, 367 Mass. 798 (1975); Commonwealth v. Martino, 412 Mass. 267, 276-277 (1992). Police officers who wish to obtain an anticipatory warrant

should consult with the District Attorney's office for assistance.

E. Impoundment of Affidavit, Application, and Return

A search warrant and its application, including the supporting affidavit, become public documents once the warrant is returned. G.L. c.276, §2B. A search warrant application, affidavit, and return may be impounded for good cause shown. Trial Court Rule VIII, Uniform Rules on Impoundment Procedure Rule 7. Good cause may be found if there is a danger of prejudicial pretrial publicity or if privacy concerns outweigh the general principle that such documents are open for public inspection. Newspapers of New England, Inc. v. Clerk Magistrate of the Ware Division of the District Court, 403 Mass. 628, 632 (1988). If you believe that your investigation is of the type which warrants impoundment, contact the District Attorney's Search Warrant Team for assistance in preparing the appropriate documents.

IV. SECURING THE PREMISES OR DETAINING THE PERSON TO BE SEARCHED WHILE OBTAINING THE WARRANT

A. Premises

In relatively rare circumstances, while the police are in the process of obtaining a search warrant for a particular premises, they sometimes become privy to information that the evidence they are seeking is about to be removed or destroyed before the warrant can be obtained. In such circumstances, the police may have the authority to secure the premises, post a guard outside them, and prevent entry to them for a reasonable period of time while a warrant is being procured. Commonwealth v. Navarro, 39

Mass. App. Ct. 161, 163-165 (1995); Commonwealth v. Voris, 38 Mass. App. Ct. 377, 381 (1995). The search must not commence thereafter until the warrant is actually issued and a copy of the warrant is present at the scene. Commonwealth v. Guaba, 417 Mass. 746, 754 (1994) (police may secure area to be searched before warrant is obtained but search conducted before warrant arrives at scene is a warrantless search).

In order to lawfully secure a premises under such circumstances, the following conditions should be present. First, the police must have probable cause to obtain a search warrant and be in the process of doing so. Second, they must have probable cause to believe that the evidence sought from the target premises will be destroyed or removed unless immediate action is taken. See Commonwealth v. Martino, 412 Mass. 267, 275-277 (1992) (guard posted at scene properly prevented defense attorney from removing evidence from premises for which search warrant was being obtained). But see Commonwealth v. Blake, 413 Mass. 823, 830 (1992) (where defendant was arrested away from his home with quantity of cocaine, permissible to secure home until warrant issued). If these conditions exist, the police have the authority to make a limited intrusion into the premises to dispel the threat to the evidence, by requiring persons inside to leave the premises or by remaining inside with those persons until the warrant is obtained. See Commonwealth v. Alvarez, 422 Mass. 198, 210-211 (1996). Police should make the intrusion as limited as possible and leave the premises as soon as the threat to the evidence is

dispelled. Because the circumstances in which police may secure premises without a warrant are limited and are heavily dependent on the facts of the particular case, it is recommended, if time permits, that you contact a member of the Search Warrant Team before attempting to secure a premises before obtaining a warrant.

B. Person

Police may also detain a person while obtaining a warrant to search him if they have probable cause to believe that his body or clothing contains evidence of a crime that could dissipate or be destroyed if he were allowed to leave. See Commonwealth v. Taylor, 426 Mass. 189, 195 (1997) (accelerant on arson suspect's clothing).

V. EXECUTION OF THE SEARCH WARRANT

A. Time Limitation

Because a search warrant must be returned within seven days of the date of issuance, G.L. c. 276, §3A, the warrant must be executed within the same seven-day period. It is advisable, however, that a warrant be executed as soon as possible after its issuance. Commonwealth v. Cromer, 365 Mass. 519, 524 (1974). The day on which the warrant issued is not included in the computation of time. Saturdays, Sundays and legal holidays, however, are counted as part of the seven-day period, although if the seventh day is not a business day the return may be made on the next business day, Mass. R. Crim. P. 46(a). A warrant executed after the expiration of the seven-day period is invalid.

A warrant served within the seven-day period but after a delay will be valid if that delay was reasonable.

Reasonable grounds for a delay include such considerations as the safety of the officers, distance to the search location from the courthouse, traffic conditions, weather, or inability to immediately locate premises or person to be searched. A warrant served within seven days but after any unreasonable delay will still be valid unless the defendant can show that he was legally prejudiced by the delay. The warrant should not be executed if intervening events tend to dissipate probable cause.

B. Nighttime Execution

Nighttime searches are expressly authorized by statute in Massachusetts. Commonwealth v. Garcia, 23 Mass. App. Ct. 259, 260 (1986). General Laws c. 276, §2 permits a nighttime search "if the warrant so directs." For warrant purposes, "nighttime" begins at 10:00 P.M. and ends at 6:00 A.M. Commonwealth v. Grimshaw, 413 Mass. 73, 81 (1992).

Although there has never been a requirement that an application for a warrant set out the reasons for the officer's wishing to search in the nighttime, id. at 77, it is recommended that the affidavit set forth good cause to believe a nighttime search is necessary. Commonwealth v. DiStefano, 22 Mass. App. Ct. 535, 543 (1986); Commonwealth v. Yazbeck, 31 Mass. App. Ct. 769, 773-774 (1992) (nighttime search subject to reasonableness standard of art. 14, Massachusetts Declaration of Rights).

Reasons for a nighttime search vary but usually include:

1. Illegal activity occurring at night (e.g., narcotics dealer sells drugs at night).
2. Items to be seized are about to be moved or destroyed.

3. One person involved in the criminal activity has been arrested and it is likely that the arrestee will alert his confederates.
4. Warrant can only be safely or successfully executed in the nighttime, because suspects conduct themselves with alert caution. It is best to have the cover of darkness and to arrive when suspect's guard is down. Commonwealth v. DiStefano, 22 Mass. App. Ct. at 543.

Special justification for a nighttime search is less important under the following circumstances:

1. Unoccupied premises. United States v. Ravich, 421 F.2d 1196, 1201 (2d Cir. 1970) (unoccupied motel rooms).
2. A commercial or industrial premises.
3. An automobile being operated or parked away from the residential premises or the operator.
4. A suitcase, box, or similar container, United States v. Gibbons, 607 F.2d 1320, 1327 (10th Cir. 1979) (trunk in an airport baggage room).

Even under such circumstances, it is advisable to set forth reasons for the nighttime search in the affidavit.

C. Gaining Entry To The Premises ("Knock and Announce Rule")

Prior to gaining entry to execute a search warrant, the police are required to knock and announce their identity and purpose. The law in Massachusetts relative to the knock and announce rule is set forth in Commonwealth v. Cundruff, 382 Mass. 137, 140, 146-148 (1980), cert. denied, 451 U.S. 973

(1981), and Commonwealth v. Scalise, 387 Mass. 413, 420-422 (1982). The "knock and announce rule" is intended to reduce the potential for violence which might result from an unannounced forcible entry, to protect the privacy of the occupants, and to avoid damage to the premises. Commonwealth v. Gomes, 408 Mass. 43, 45 (1990). Absent consent, possession of a valid "no knock" warrant, or exigent circumstances arising at the time of the execution, failure to knock and announce could render the search illegal and result in the suppression of the evidence seized. Id. at 45-46.

In determining whether a violation of the knock and announce rule requires suppression of evidence, the courts consider (1) the degree to which the violation undermined the principles underlying the rule, and (2) the extent to which suppression will deter such violations from being repeated in the future. Commonwealth v. Lopez, 31 Mass. App. Ct. 547, 549-550 (1991). Although the defendant bears the burden of establishing a violation of the knock and announce rule, Commonwealth v. Brisson, 31 Mass. App. Ct. 418, 421 (1991), police should seek specific authorization to dispense with the rule if it is anticipated that the rule will not be observed. (See Part V.D. below.)

Even without authorization, police may dispense with one or more components of the knock and announce procedure under certain circumstances. These circumstances include:

1. "Useless gesture" exception: There is no need to state purpose where, based on observations made by police at the door, the police are virtually certain that the occupant already knows their purpose. Commonwealth v. Antwine,

417 Mass. 637, 639 (1994); Commonwealth v. Gondola, 28 Mass. App. Ct. 286, 290 (1990). See also Commonwealth v. Wornum, 421 Mass. 220, 222 (1995) (where police encountered an occupant of the apartment to be searched on the way to execute the warrant, and the occupant agreed to accompany police to the apartment, "the objectives of the rule were substantially achieved," even though police did not act in full compliance with the rule).

2. Where police reasonably fear serious harm to themselves or others. Commonwealth v. Allen, 28 Mass. App. Ct. 589, 595 (1990) (excused from stating purpose).
3. Where police have reasonable belief evidence would be destroyed. Commonwealth v. Osorno, 30 Mass. App. Ct. 327, 332 (1991) (excused from stating purpose where police see occupant run toward bathroom with plastic bag).

After making their presence and purpose known, police may not make a forcible entry unless one of the following circumstances develops at the time of the execution of the warrant:

1. The occupant refuses to admit entry.
2. Police receive no response after waiting a reasonable period of time. Commonwealth v. Yazbeck, 31 Mass. App. Ct. 769, 773-774 (1992).
3. Police reasonably believe based on immediate circumstances that evidence may be destroyed. Commonwealth v. Carrasco, 405 Mass. 316, 319-320, 325 (1989) (forced entry justified, after police announced their identity, when they heard running footsteps inside the door).
4. Police reasonably believe, based on immediate circumstances, that they are in danger, e.g.,

police observe armed suspects in the premises to be searched.

Aggressively knocking and kicking against a locked door eventually opened by the defendant is not a forcible entry. Commonwealth v. Rivera, 429 Mass. 620, 624 (1999). It is permissible to gain entry to the premises by means of a nonthreatening ruse if a resident of the premises consents to the entry. Commonwealth v. Watson, 36 Mass. App. Ct. 252, 258 (1994) (undercover officer knocked on door to do drug buy, door answered and opened, police advanced, announced purpose, and pushed undercover officer and target into apartment); Commonwealth v. Goggin, 412 Mass. 200, 201-203 (1992). It is important to note, however, that the use of a ruse has been upheld only in situations where the purposes of the knock and announce rule, i.e., decreasing potential for violence, invasion of privacy, and damage to homes, were not undermined. Thus, knocking on the door and shouting, "Come out of your apartment; there's a fire in the building!" would not likely be approved since this would create panic and thwart the objectives of the knock and announce rule.

D. "No-Knock" Search Warrants

The police may seek authorization to dispense with the knock and announce rule by applying for a "no knock" search warrant. The words "No Knock" should be added at the top of the warrant form. The box next to the word "are" in the section concerning the knock and announce rule should be checked. (See II.B.f. above.)

The affidavit must set forth sufficient facts supporting an exception to the knock and announce rule. If the affidavit fails to contain such facts, forcible entry without knocking and announcing may result in suppression of evidence seized even if a magistrate issues a no-knock warrant. Commonwealth v. Gomes, 408 Mass. 43, 45-46 (1990); Commonwealth v. Lopez, 31 Mass. App. Ct. 547, 549-550 (1991). Facts to be set forth in an affidavit which would justify the issuance of a no-knock warrant include the following.

1. Destruction of evidence: the affiant must set forth sufficient facts to establish probable cause to believe that knocking and announcing will result in the destruction of evidence. It is not sufficient that the objects named in the search warrant may, by their nature (e.g., drugs), be easily destroyed. See Commonwealth v. Macias, 429 Mass. 698, 702 (1999) (mere fact that drugs are easily destroyed does not suffice for no-knock warrant, especially where cocaine was individually packaged in baggies, some of which were tied, and stored in multiple locations around the apartment). However, the ease of destruction of the evidence in question is a factor that may be considered by the magistrate when reviewing a request for a no-knock warrant. Commonwealth v. Prunier, 33 Mass. App. Ct. 944, 944-945 (1992). For example:

- a. Suspect's use of "flash" or water soluble paper to maintain written records of his criminal venture.
- b. Suspect's awareness of police surveillance because of his recent arrest and the fact that he may be prepared for quick disposal of drugs should there be a knock on the door and announcement by the police.

Commonwealth v. Prunier, 33 Mass. App. Ct. 944, 944-945 (1992).

- c. Extensive surveillance by persons selling drugs made destruction of the drugs more likely if the police were required to knock and announce their presence. Commonwealth v. Munera, 31 Mass. App. Ct. 380, 384 (1991).
 - d. Physical obstacles on the premises, such as a guard dog or a reinforced door, which may cause an appreciable delay in police access to premises.
 - e. Identities of investigating police officers are known to suspect.
 - f. Any other information or counter-surveillance technique which suggests that the suspect intends to destroy evidence in the event of a search of his premises by the police.
2. Danger to Persons: the affiant must set forth sufficient facts to establish a strong possibility for believing that knocking and announcing will result in violent resistance threatening the safety of the officers, the persons in the premises, and/or the public. For example:
- a. The suspect is known to be armed. Commonwealth v. Munera, 31 Mass. App. Ct. 380, 384 (1991).
 - b. The suspect has previously stated an intent to resist a search by the police.
 - c. The suspect has resisted the police in the past.
 - d. The suspect has a record for violent crimes.

- e. Any other factors concerning the dangerousness of the suspect and his intent to resist a search.

3. Escape of Suspect: the affiant must set forth sufficient facts to establish probable cause to believe that knocking and announcing will result in the escape of the suspect. For example:

- a. Seriousness of alleged offense.
- b. Physical layout of suspect's premises permits easy escape through one or more alternative exits.
- c. Prior information about suspect indicating likelihood of flight.

The Supreme Judicial Court has found that the following language included in a search warrant affidavit justified dispensing with the knock and announce rule. Officers are cautioned not to use this language verbatim in affidavits but to use it as a model in describing the particular circumstances of each case.

"When conducting a drug raid the narcotics officers place emphasis on safety first. During these incidents our officers are entering an unknown situation which could possibly result in injury to either an officer or other person present. Thus, the element of surprise is a safety valve which enables our officers to enter quickly and safely with a minimum of risk. It has been my experience that drug dealers often carry weapons to protect themselves from rip offs by other drug dealers, and that these weapons are usually handguns. I have been present many times on past raids when our officers

have recovered [s]uch handguns, and I was present when a CPB narcotics officer was shot with a handgun on a drug raid. Also, the faces of narcotics officers are well known to drug dealers in the area who could warn of our arrival and result in the destruction of evidence or the escape of suspects before we are able to secure them. Additionally, the substance cocaine is a type of drug which could be easily destroyed by flushing in a sink or toilet should the presence of the police become known, thus destroying valuable evidence which is necessary for proper prosecution in court. And finally, having never been inside this location personally, I have no way of knowing for certain what level of fortification or degree of resistance we will encounter there. For all the above reasons I am requesting a no-knock warrant be issued for the above location."

Commonwealth v. Rodriguez, 415 Mass. 447, 449 n. 1 (1993).

If facts which would support the issuance of a no-knock warrant are known to the applicant before the warrant is obtained and these facts are not presented to the magistrate, a warrant executed without knocking and announcing will be held invalid. Commonwealth v. Manni, 398 Mass. 741, 742-743 (1986). Conversely, if the information presented to the magistrate in support of the issuance of a no-knock warrant either changes or no longer exists at the time of execution, and if there is otherwise no lawful reason to dispense with the knock and announce rule, the police must knock and announce before executing the warrant. Commonwealth v. Macias, 429 Mass. 698, 704 (1999). To this end, the police must make a threshold appraisal, at the scene, of the facts asserted in support of the no-knock

provision before effectuating a forced entry. See Commonwealth v. Prunier, 33 Mass. App. Ct. 944, 945 (1992).

Once police have obtained a valid no-knock warrant, they may use their discretion in executing it with reasonable force. See Commonwealth v. Garner, 423 Mass. 735, 745 (1996) (special authorization of magistrate not necessary to use stun grenade).

NOTE: The requirements for a valid no-knock warrant are very strict. If an officer believes that a no-knock warrant is necessary, he/she should contact a member of the District Attorney's Search Warrant Team. Use of a no-knock warrant without the requisite amount of information to obtain such a warrant may result in the suppression of all evidence seized during execution of the warrant. Where the police had a valid no-knock warrant to execute an arrest warrant for a person wanted for two murders and had a reasonable belief that weapons were at the premises, they were entitled to protect themselves during the execution of the warrant by kicking a mattress off a bedspring and out of the reach of the occupants. A gun found beneath the mattress was properly seized. Commonwealth v. Bui, 419 Mass. 392, 394-396 (1995).

E. Civilian Assistance

In certain circumstances, because of the complexity of the investigation or the specialized nature of the evidence being sought, police might have a reasonable basis to seek permission for a civilian (i.e., non-police) witness to accompany police on the search. Commonwealth v. Sbordone, 424 Mass. 802, 807-808 (1997). Examples include a civilian investigator for the Attorney General's insurance fraud

bureau, Sbordone, 424 Mass. at 804, and an emergency room doctor conducting a body cavity search, Rodriques v. Furtado, 410 Mass. 878, 881 (1991). An affidavit seeking such permission should state that the affiant has a reasonable basis to conclude that a named civilian's assistance during the search would be materially helpful to the police. Sbordone, 424 Mass. at 807-808. Police should limit the civilian's assistance by having an officer accompany and closely supervise the civilian at all times, and by restricting the civilian's participation to acts within the civilian's special area of expertise. Sbordone, 424 Mass. at 808. The civilian's name should be noted on the search warrant itself. Sbordone, 424 Mass. at 806 n.9.

VI. CONDUCTING THE SEARCH

A. The warrant should be shown to the person or persons in control of the premises and they should be given an opportunity to read the warrant. Commonwealth v. Guaba, 417 Mass. 746, 754 (1994). (This procedure may be dispensed with if the person is resisting or otherwise not acting in a peaceful manner.) The premises may be searched in the absence of an occupant.

If the warrant itself refers to another document which more specifically describes the property sought or the place to be searched, make sure that a copy of the referenced document is attached to the warrant. Commonwealth v. Rutkowski, 406 Mass. 673, 675, 677 (1990). In any event, it is recommended that the executing officer carry with him a

copy of the affidavit supporting the issuance of the search warrant, Commonwealth v. Walsh, 409 Mass. 642, 645 (1991), although the affidavit need not be shown to the occupant. But see Commonwealth v. Callahan, 41 Mass. App. Ct. 420, 426-428 (1996) (motion to suppress allowed where anticipatory warrant did not contain description of triggering event and, although executing officer carried supporting affidavit in back pocket, he did not show it to occupant along with warrant prior to search).

The police may search only the premises described in the warrant. Such premises, however, includes the yard and out-buildings (garage, tool shed) within the "curtilage" of the residence. See Commonwealth v. Allard, 37 Mass. App. Ct. 676, 677-678 (1994). The authority to search also includes any motor vehicles located within the curtilage and which are either owned or controlled by an owner of the residence. Commonwealth v. Signorine, 404 Mass. 400, 405 (1989). Automobiles parked in an attached or detached garage located on the property, or on the driveway to the residence are within the curtilage. Conversely, an automobile parked on a public street or in a public garage is not within the curtilage. Commonwealth v. Santiago, 410 Mass. 737, 741 (1991). Although a specific description of an automobile to be searched need not be included in the warrant, the better practice is to include such a description where a particular vehicle is likely to be searched.

The police may only search in places within the premises where the property to be seized may reasonably be expected

to be found. Commonwealth v. Wills, 398 Mass. 768, 774-775 (1986). If searching for small items such as rings or cocaine, the police may search in any place where such property could be secreted. If searching for a large item such as a television set, the police may look in closets and other large hiding places, but not in small drawers or coat pockets. If searching for an unknown quantity of an item such as drugs, the search may continue until each place in the premises where drugs could be found has been completely searched. If searching for a specific quantity of an item such as five television sets, the search must cease when the fifth television set is found.

The preferred method of conducting a search is to appoint one officer to be the "evidence officer." Each participating officer should know the specific objects of the search. As the other officers uncover evidence, they should leave it in place and call the evidence officer to take custody of the item. The evidence officer should take note of the type of item and where it was found for later reference. If feasible, it is very useful to photograph the item before moving it from the place where it was discovered. An officer who has a question on a matter relating to the search (e.g., scope of the search), should ask a supervisor out of the hearing of anyone present at the premises.

VII. RETURN OF THE WARRANT

Warrants must be returned within seven days from the date of issuance. G.L. c. 276, §3A. Failure to make the return within seven days does not invalidate the warrant,

but late return should be avoided. Commonwealth v. Cromer, 365 Mass. 519, 521 n.3 (1974). The warrant is usually returned to the District Court with territorial jurisdiction over the offense, even if the warrant was issued by a Superior Court judge. Warrants must be returned by an officer who served the warrant, but this need not be the officer who applied for the warrant. If a return is made by an officer not conducting the search, the items seized need not be suppressed in the absence of prejudice to the defendant. Commonwealth v. Aldrich, 23 Mass. App. Ct. 157, 162-163 (1986).

The return should list all property seized during the execution of the warrant. Items not so listed will be suppressed. Commonwealth v. Ierardi, 17 Mass. App. Ct. 297, 302 (1983). If the officer making the return did not conduct the search, he/she should so note on the return and state where/from whom information about the search was obtained. Property not listed on the warrant but found in plain view during the search should be listed on the return under a separate heading of "evidence found in plain view." The officer making the return must sign the return in the presence of a clerk or assistant clerk. Although defects in the return will not invalidate an otherwise properly issued and executed search warrant, such defects should nonetheless be avoided. Commonwealth v. Freiberg, 405 Mass. 282, 300 (1989). Once the warrant is returned, both the warrant and the affidavit become public records unless an impoundment order has been issued. G.L. c. 276, §2B.

Train5

APPLICATION FOR SEARCH WARRANT

A

G.L. c. 276, §§ 1-7

343A

TRIAL COURT OF MASSACHUSETTS



NAME OF APPLICANT

COURT DEPARTMENT

POSITION OF APPLICANT

SEARCH WARRANT DOCKET NUMBER

I, the undersigned **APPLICANT**, being duly sworn, depose and say that:

1. I have the following information based upon the attached affidavit(s), consisting of a total of _____ pages, **5.** which is (are) incorporated herein by reference.

2. Based upon this information, there is **PROBABLE CAUSE** to believe that the property described below:

- ☐ has been stolen, embezzled, or obtained by false pretenses.
☐ is intended for use or has been used as the means of committing a crime.
☐ has been concealed to prevent a crime from being discovered.
☐ is unlawfully possessed or concealed for an unlawful purpose.
☐ is evidence of a crime or is evidence of criminal activity.
☐ other (specify) _____

3. I am seeking the issuance of a warrant to search for the following property (describe the property to be searched for as particularly as possible):

7.

4. Based upon this information, there is also probable cause to believe that the property may be found (check as many as apply):
☐ at (identify the exact location or description of the place(s) to be searched):

8.

which is occupied by and/or in the possession of: _____

☐ on the person or in the possession of (identify any specific person(s) to be searched): _____

☐ on any person present who may be found to have such property in his or her possession or under his or her control or to whom such property may have been delivered.

THEREFORE, I respectfully request that the court issue a Warrant and order of seizure, authorizing the search of the above described place(s) and person(s), if any, to be searched, and directing that such property or evidence or any part thereof, if found, be seized and brought before the court, together with such other and further relief that the court may deem proper.

- I ☐ have previously submitted the same application.
I ☐ have **not** previously submitted the same application. **9.**

PRINTED NAME OF APPLICANT

SIGNED UNDER THE PENALTIES OF PERJURY

X

11.

Signature of Applicant

SWORN AND SUBSCRIBED TO BEFORE

X

12.

Signature of Justice, Clerk-Magistrate or Assistant Clerk

13.

DATE

SEARCH WARRANT

COURT DEPARTMENT

a.

DIVISION

SEARCH WARRANT DOCKET NUMBER

B

G.L. c. 276, §§ 1-7

TO THE SHERIFFS OF OUR SEVERAL COUNTIES OR THEIR DEPUTIES, ANY STATE POLICE OFFICER, OR ANY CONSTABLE OR POLICE OFFICER OF ANY CITY OR TOWN, WITHIN OUR COMMONWEALTH:

Proof by affidavit, which is hereby incorporated by reference, has been made this day and I find that there is **PROBABLE CAUSE** to believe that the property described below:

- ☐ has been stolen, embezzled, or obtained by false pretenses.
☐ is intended for use or has been used as the means of committing a crime.
☐ has been concealed to prevent a crime from being discovered.
b. ☐ is unlawfully possessed or concealed for an unlawful purpose.
☐ is evidence of a crime or is evidence of criminal activity.
☐ other (specify) _____

YOU ARE THEREFORE COMMANDED within a reasonable time and in no event later than seven days from the issuance of this search warrant to search for the following property:

c.
☐ at:
d.

which is occupied by and/or in the possession of: _____

☐ on the person or in the possession of: _____

e. You ☐ are ☐ are not also authorized to conduct the search at any time during the night.

f. You ☐ are ☐ are not also authorized to enter the premises without announcement.

g. You ☐ are ☐ are not also commanded to search any person present who may be found to have such property in his or her possession or under his or her control or to whom such property may have been delivered.

YOU ARE FURTHER COMMANDED if you find such property or any part thereof, to bring it, and when appropriate, the persons in whose possession it is found before the

h. Division of the _____ Court Department.

DATE ISSUED

i.

SIGNATURE OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK

x. k.

FIRST OR ADMINISTRATIVE JUSTICE

PRINTED NAME OF JUSTICE, CLERK-MAGISTRATE OR ASSISTANT CLERK

WITNESS: j.l.

NARCOTICS ASSET FORFEITURE

I. STATUTORY BASIS FOR FORFEITURE

A. Overview

Massachusetts General Laws c. 94C, § 47 (the "Statute") provides for the forfeiture of certain property related to drug distribution. The circumstances differ for each type of property, but in general, property may be subject to forfeiture if it is used to "facilitate" drug distribution or if it is "proceeds traceable" to drug distribution. The Statute permits forfeiture either by way of a motion in the related criminal case or by filing a separate civil action. The Commonwealth's evidentiary burden is the same as that for search warrants -- probable cause. The objective of the Statute is to punish drug dealers by removing the profits and instrumentalities of their illegal transactions and to recover the costs of drug investigations and prosecutions.

In order for the Commonwealth to initiate a forfeiture action under this Statute, there must be a violation of certain offenses relating to either Class A, B, C, and D controlled substances. These offenses are: possession with intent to distribute; trafficking; sale to a minor; distribution within 1000 feet of a school or 100 feet of a public park; or conspiracy to commit any of these offenses.

Note: Possession alone is insufficient. However, the Statute merely requires a violation and not a conviction of the above noted offenses. Therefore, if the charges are ultimately reduced or the defendant pleads to straight possession, or even if the criminal case is dismissed, the Forfeiture Unit may still be able to proceed by way of a civil forfeiture action.

II. SPECIFIC BASIS FOR FORFEITURE

A. Cash

Cash and "cash substitutes" (i.e. negotiable instruments and securities) have the broadest basis for forfeiture. If cash is used or intended to be used to facilitate drug dealing, if it is exchanged or intended to be exchanged in a drug transaction, or if it is proceeds traceable to such an exchange, including real estate and any other thing of value, it is subject to forfeiture. It is not required that the cash be tied to any particular drug transaction, but the closer you can tie the property to a particular transaction, the more likely the forfeiture will be successful.

B. Vehicles

Vehicles, boats and airplanes are subject to forfeiture if they are used, or intended to be used, to transport, conceal or otherwise facilitate the distribution of or possession with intent to distribute a controlled substance. The phrase "otherwise facilitate" has been interpreted to allow the forfeiture of a vehicle that is merely used to transport parties to or from a drug transaction.

Vehicles are also subject to forfeiture if they can be traced back to an exchange for a controlled substance. This applies to a vehicle actually exchanged in a drug transaction or purchased with the proceeds of a drug transaction.

C. Other Personal Property

Anything other than cash, vehicles and real estate is also subject to forfeiture if it is used, or intended to be used, to transport, conceal or otherwise facilitate the

distribution of or possession with intent to distribute a controlled substance.

D. Real Property

Real Property may be forfeited if it is used in any manner or part to commit or to facilitate the commission of a violation of the drug distribution laws, or under the "exchange" or "proceeds-traceable-to-an-exchange" basis noted above.

III. POLICIES & PROCEDURES

A. District/Superior Court

The policy of the Middlesex District Attorney's Office is that only cash in an amount less than \$2,500.00 may be forfeited in connection with the criminal case in the District/Superior Court. However, cases involving cash in an amount less than \$2,500 and a vehicle should be referred to the Forfeiture Unit for civil forfeiture. For example, if only \$350 dollars in cash and an automobile was seized in the arrest, then the lesser amount of cash would be joined with the automobile into one civil proceeding.

1. Notice of Intent to Seek Forfeiture

In qualifying all drug cases where there has been a seizure of any amount of money or any other property, the Assistant District Attorney assigned to the criminal case must file a Notice of Intent to Seek Forfeiture (NITSF). A NITSF should be filed at the earliest possible opportunity, preferably at the arraignment. A copy of the NITSF should be: (1) given to the defendant and/or his attorney; (2) faxed to the forfeiture unit; and (3) kept in the criminal file.

Note: Failure to file a timely NITSF may bar the Commonwealth from obtaining an Order of Forfeiture in either the criminal case or in the separate civil action.

2. Case Evaluation

Upon being assigned a drug case involving any of the qualifying offenses, it is the responsibility of the Assistant District Attorney assigned to the case to inquire of the arresting police officer whether money, vehicles or other property subject to forfeiture were seized. In addition, if the Assistant District Attorney's review of the case uncovers assets that he or she believes may be subject to forfeiture, he or she should immediately (1) complete a Forfeiture Intake Form and forward it to the Forfeiture Unit together with copies of all police reports, search warrants and affidavits, and (2) file a Notice of Intent to Seek Forfeiture in the criminal session (whether District or Superior Court) as soon as possible.

3. Motion/Order of Forfeiture

At the disposition of the criminal case, a Motion for Forfeiture with an attached Order should be filed by the Assistant District Attorney. The defendant is entitled to an evidentiary hearing on the forfeiture issue and is also entitled to not less than 7 days advance notice of such hearing. The judge may set a separate hearing date for the forfeiture issue. If so, the Assistant District Attorney must advise the Forfeiture Unit as soon as possible so that they may brief him or her on the current forfeiture law and/or make arrangements to have the forfeiture Assistant District Attorney present at the hearing.

If the Motion for Forfeiture is allowed, a *signed* copy of the Order *must* be faxed to the Forfeiture Unit as soon as possible. A copy of the Order should be given to the police department that seized the money and placed in the criminal case file. Distribution of the forfeited assets will be handled by the Forfeiture Unit.

4. General Policies

a) Defaults

In cases involving the forfeiture of monies in an amount less than \$2,500, where the defendant defaults in the criminal matter, the forfeiture matter should be referred to the Forfeiture Unit as soon as possible so that they may initiate a civil forfeiture action against the same monies.

b) Return of Property

The Assistant District Attorney assigned to a criminal case involving forfeitable assets must never enter into an agreement with a defendant or defense counsel, or recommend to the court, that any portion of the property be returned to the defendant *unless approved*, in advance, by his or her supervisor, the Forfeiture Unit, and the applicable the police department.

c) Pleas

When making a plea recommendation on a qualifying drug case, the Assistant District Attorney may make forfeiture of any money a part of the recommendation. However, you must never reduce or agree to a lesser disposition in return for an agreement by a defendant to forfeit money.

B. Police Departments

1. At Time of Seizure

a) The law allows any police officer to seize personal property subject to forfeiture without a court order incident to arrest or under a search warrant or when he or she has probable cause to believe that the property was used or is intended to be used in violation of the offenses noted above. This means that if the officer is in a place he or she has a right to be, he or she may, without a court order, constitutionally seize property in plain view which he or she has probable cause to believe is subject to forfeiture.

b) If the seizure would involve intrusion into or upon a privacy interest or a situation defined by statute as requiring process (e.g. a bank), a "seizure order" from the Superior Court would be required to seize the property. The officer must be able to state facts in the affidavit for the seizure order that leads the judge to conclude there is probable cause to believe the property is subject to forfeiture.

c) A seizure order may also be used for assets that are physically unavailable or impractical to seize. For example, a vehicle used to facilitate a drug transaction early in an investigation may not be present when the investigation is concluded and the arrest made. A seizure order could then be used to prevent the transfer of and/or seize the property.

d) The police department/seizing agency must complete a Notice of Asset Seizure Form (to which is attached all the relevant documentation concerning the

seizure) and forward the package to the Middlesex District Attorney's Office for review and action. The following must be included with every Form: copies of all relevant reports; copies of any search warrants (with return); and any agreements with other agencies as to the sharing of the proceeds of the forfeiture.

e) The law enforcement agency must take reasonable steps to protect and preserve the property. In appropriate (larger) cases, seized money should be placed in an interest bearing trust account, upon stipulation of the District Attorney's Office and defense counsel, until it is declared forfeited and distributed.

IV. CONTACT INFORMATION

The Forfeiture Unit of the Middlesex County District Attorney's Office may be reached during normal business hours at 617-494-8500. The mailing address is 47 Thorndike Street, Cambridge, MA 02141. The FAX number is 617-621-0911. Please contact the Unit Director or Coordinator if you have any questions concerning the drug asset forfeiture process or are seeking assistance in seizing or forfeiting such assets.

APPENDIX

HOMICIDE NOTIFICATION

State Police (617) 494-4055 Daytime Monday-Friday
(508) 820-2121 Nighttime

If unable to reach State Police, call one of the following:

- 1. JOHN MCEVOY Beeper (617) 468-8529 or (617) 484-8292**
- 2. LYNN ROONEY Beeper (617) 339-9701 or (978) 318-9921**
- 3. ADRIENNE LYNCH Beeper (617) 339-9908 or (617) 969-2352**

MOTOR VEHICLE HOMICIDE NOTIFICATION

In the event of a Motor Vehicle Homicide, call the following:

MEGAN STORING
Beeper (617) 882-4315
(617) 527-2150

- or -

CAMBRIDGE REGION

ADRIENNE LYNCH
Beeper (617) 339-9908
OR (617) 969-2352

FRAMINGHAM REGION

ED BEDROSIAN
Beeper (617) 468-3144
OR (617) 484-8995

LOWELL REGION

TOM O'REILLY
Beeper (617) 339-7343

24 - HOUR SEARCH WARRANT TEAM

Beeper: (617) 430-1522

CHILD ABUSE UNIT EMERGENCY

Beeper: (617) 339-2888

SPECIAL INVESTIGATIONS DIVISION
(NARCOTICS / WHITE COLLAR CRIME / PUBLIC CORRUPTION)

Beeper: (617) 468-9583

24 - HOUR DUTY LINE for other questions

Beeper: (617) 430-1520

PROCEDURE FOR NOTIFICATION OF DEATH BY VIOLENCE OR UNNATURAL CAUSES

When a Police Officer or Medical Examiner is informed of a Death by Violence or Unnatural Causes, he shall notify the District Attorney by the following procedure:

**1. During regular business hours (8:30 AM to 5:00 PM)
contact the State Police Unit at:
(617) 494-4055**

**2. After business hours (5:00 PM to 8:30 AM), call the
Massachusetts State Police Headquarters
in Framingham at:
(508) 820-2121.**

**3. If for any reason you have difficulty reaching the State Police,
please contact one of the following:**

- 1. John McEvoy Beeper (617) 468-8529 (617) 484-8292**
- 2. Lynn Rooney Beeper (617) 339-9701 (978) 318-9921**
- 3. Adrienne Lynch Beeper (617) 339-9908 (617) 969-2352**

FAMILY PROTECTION UNIT

DOMESTIC VIOLENCE DIVISION

21 McGrath Highway

Somerville, MA 02143

Phone: (617) 629-0222

Fax: (617) 629-0224

Frances MacIntyre, Director, Assistant District Attorney

Audrey Huang, Assistant District Attorney

Nora Mann, Special Assistant District Attorney

Amy Prisco-Ring, Victim Witness Advocate

Kim Bruno, Administrative Assistant

Barbara Hodgkins, Administrative Assistant

**DOMESTIC VIOLENCE CONTACT PERSONS
DISTRICT COURT**

<u>Ayer</u>	978-772-4907	Kate MacDougall/ADA
		Jill Kelley/VWA
<u>Cambridge</u>	617-494-4630	Allison O'Neil/ADA
		Kara Grant/VWA
<u>Concord</u>	978-369-0225	Erin Duggan/ADA
		Lynn Hanko/VWA
<u>Framingham</u>	508-872-4355	Lisa Klawnsnik/ADA
		Ingrid Moner/VWA
<u>Lowell</u>	978-458-4440	George Zachos/ADA
		Kerry Sullivan/VWA
<u>Malden</u>	781-322-2020	Edward Montez/ADA
		Debbie Bercovitch/VWA
<u>Marlboro</u>	508-485-2338	Kerry Aleman/ADA
		Kim Audette/VWA
<u>Natick</u>	508-653-4332	Paul Brodeur/ADA
		Angela Gautier/VWA
<u>Newton</u>	617-964-6650	Roxanne Sami/ADA
		Jennifer O'Brien/VWA
<u>Somerville</u>	617-625-2520	Carolyn Cartelli/ADA
		Lesia Schymonowysch/VWA
<u>Waltham</u>	781-893-7140	Madeline Leone/ADA
		Joanne Szeto/VWA
<u>Woburn</u>	781-933-9586	Abra Siegel/ADA
		Raina Rizzitano/VWA

Appeals Division

Amy Bannes/ADA 494-4072

Esther Bixler/ADA 494-4496

Kim Diaz/ADA 494-4072

**Elder Services
Middlesex County**

BayPath Home & Community Services, Inc.

Tel: 508-872-1866

Fax: 508-872-3325

Toll Free: 800-287-7284

354 Waverly Street, 2nd Floor, Framingham 01702

Framingham, Holliston, Hopkinton, Hudson, Marlborough,
Natick, Sudbury, Wayland

Elder Services of Merrimack Valley, Inc.

Tel: 978-683-7747

Fax: 978-687-1067

Toll Free: 800-892-0890

Riverwalk Building #5, 360 Merrimack St, Lawrence 01843

Billerica, Chelmsford, Dracut, Dunstable, Lowell, Tewksbury,
Tyngsborough, Westford

Minuteman Home Care

Tel: 781-272-7177

Fax: 781-229-6190

24 Third Avenue, Burlington 01803

Acton, Arlington, Bedford, Boxborough, Burlington, Carlisle,
Concord, Lexington, Lincoln, Littleton, Maynard, Wilmington,
Winchester, Woburn

Montachusett Home Care Corporation

Tel: 978-537-7411

Fax: 978-537-9843

Crossroads Office Park, 680 Mechanic St., Suite 120, Leominster 01453-4402

Ashby, Ayer, Groton, Pepperell, Shirley, Townsend

Somerville-Cambridge Elder Services, Inc.

Tel: 617-628-2601

TDD: 617-628-1705

Fax: 617-628-1085

61 Medford Street, Somerville 02143

Somerville, Cambridge

Mystic Valley Elder Services, Inc.

Tel: 781-324-7705

TDD: 781-321-8880

Fax: 781-324-1369

19 Riverview Business Park, 300 Commercial Street, Malden 02148

Everett, Malden, Medford, Melrose, North Reading, Reading,
Stoneham, Wakefield

West Suburban Elder Services, Inc.

Tel: 617-926-4100

TDD: 617-926-5717

Toll Free: 888-609-2400

Fax: 617-926-9897

Parker Office Building, 124 Watertown Street, Watertown 02472-2598

Belmont, Newton, Weston, Waltham, Watertown

Elder Abuse Hotline: 1-800-922-2275

Elder Affairs: 1-800-882-2003

Web Site: www.state.ma.us/elder

